FEB 20 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927

No. 404

THE BALTIMORE & OHIO RAILROAD COMPANY; WILLIAM W. WHEELOCK AND WILLIAM G. BIERD, RECEIVERS OF THE CHICAGO & ALTON RAILROAD COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; ILLINOIS TRACTION, INC.; ILLINOIS CENTRAL RAILROAD COMPANY; LITCHFIELD & MADISON RAILWAY COMPANY; LOUISVILLE & NASHVILLE RAILROAD COMPANY; MOBILE & OHIO RAILROAD COMPANY; THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; SOUTHERN RAILROAD COMPANY, AND WABASH RAILWAY COMPANY,

Appellants,

VS.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION; THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY, AND ST. LOUIS-SAN FRANCISCO RAILROAD COMPANY,

Appellees.

BRIEF FOR APPELLANTS

D. P. CONNELL, HOMER T. DICK, W. A. NORTHCUTT, GUERNSEY ORCUTT, CHARLES J. RIXEY, LOUIS H. STRASSER, W. J. STEVENSON, ELMER A. SMITH, FRANK H. TOWNER, MORISON R. WAITE,

Counsel for Appellants.

Office Date. 2/25/37

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of Illinois, composed of three judges, pursuant to the provisions of the United States Code, Title 28, Section 41 (28) and Sections 43 to 48 inclusive, being codification of the provisions of the act of Congress of October 22, 1913, 38 Statutes at Large 219, and the pertinent provisions of the judicial code relating to the commerce court. This decree dismissed the Bill of the Appellants who were plaintiffs below, to set aside and enjoin the order of the Interstate Commerce Commission entered on July 12, 1926, in its Docket No. 16697, which proceeding was brought before that Commission by the Chicago, Rock Island & Pacific Railway Company, Missouri-Kansas-Texas Railroad Company, the Missouri Pacific Railroad Company, and the St. Louis-San Francisco Railroad Company, complainants, known in that proceeding and hereinafter called the West Side Lines, who intervened in the proceeding in the District Court and are Appellees here. The plaintiffs below and the Appellants here will be hereinafter referred to as the East Side Lines.

This is a continuation of the controversy between these railroads concerning the expense of transfer charges across the Mississippi River between St. Louis and East St. Louis, which was last before this Court in *Terminal Railroad Association of St. Louis* v. *United States*, 266 U. S. 17 (October 13, 1924). By the decision of this Court in that case, the East Side Lines were advised that the controversy was one involving rates and divisions, of which the Interstate Commerce Commission had primary jurisdiction. Following that decision the West Side Lines appealed to the Commission but did not invoke its jurisdiction in reference to rates and divisions, but presented the question solely as one involving a "practice" and it was so treated and decided by the Commission. One of the principal questions here to be determined is whether the basis of making through rates that has obtained for approximately fifty

years can be changed at great expense to the East Side Lines and to the corresponding great advantage of the West Side Lines without consideration being given to the comparative measure of the rates of each of the parties for the service performed.

PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION

The complaint of the West Side Lines before the Interstate Commerce Commission is Exhibit No. 3 to the Bill of Complaint in the court below, and is printed in the Record beginning at p. 30. It is alleged that the complainants and defendants are common carriers engaged in the transportation of passengers and property wholly by railroad between points in the State of Missouri and points in the State of Illinois and other states, and are subject to the provisions of the Interstate Commerce Act. The complaint alleges the existence of companies, of whom The Terminal Railroad Association is one, engaged in carrying freight across the Mississippi River between the St. Louis, Missouri and East St. Louis, Illinois switching districts, which exact for their services certain sums of money in the form of freight charges which vary in amounts depending upon the class or kind of traffic transported and which said charges on both through west and east bound traffic are ultimately paid and borne by the carriers, including the complainants whose lines of railroad come into St. Louis, Missouri from the West, commonly known as West Side Lines.

As stated by the Commission in its report (Rec., p. 16):

> "The principal defendants are the east-side carriers serving East St. Louis, 13 in number, although most of the carriers in the eastern and southern groups

> are also named as defendants. Defendants Chicago, Burlington & Quincy and Wabash, with lines on both sides of the river, have made themselves cross-complainants with respect to trans-Mississippi River traffic moving over their lines west of the river and interchanged with each other or with other defendants through the St. Louis-East St. Louis gateway. To the extent that they are cross-complainants they seek whatever relief is accorded complainants."

These principal defendants, East Side Lines, other than the Chicago, Burlington & Quincy, were plaintiffs below and are Appellants here.

The substance of the complaint is thus epitomized by the Commission in its report (Rec., p. 17):

> "In substance, the allegations of the complaint are that the East Side Lines' practice of requiring the West Side Lines to assume the burden and expense of delivering through west bound traffic to them at St. Louis, while at the same time being relieved by the West Side Lines of the similar burden and expense on east bound traffic, is unjust, unreasonable, unjustly discriminatory, unduly preferential and prejudicial, unlawful, and illegal. There is a further allegation that the East Side Lines refuse to provide reasonable facilities for the operation of through routes and to make reasonable rules and regulations with respect to the operation of such routes, but no change in the present method of handling the traffic is sought. This allegation is included only to provide a basis for a certain contention, hereinafter dealt with, which bears upon the propriety of the practice mentioned. All that the West Side Lines seek in this case is to be relieved of paying the transfer expense on west bound traffic. In the final analysis their prayer is that we condemn the present practice, require the observance of a proper practice, and award reparation for the two-year period prior to February 5, 1925, the date on which the complaint was filed."

The issue is thus summarized by the Commission (Rec. p. 16):

> "The ultimate question here is whether the East Side Lines or the West Side Lines should bear the expense incident to the transfer across the Mississippi River from East St. Louis, Ill., to St. Louis, Mo., of practically all carload and less-than-carload through freight originating east of the St. Louis-East St. Louis district and destined west thereof."

The principal defendants filed answers denying specifically the material allegations of the complaint and containing this further paragraph:

> "Further answering, these defendants aver that the sole question in this case is as to the lawful measure of the amounts received by the East Side Lines and the West Side Lines respectively, for their services in connection with through traffic moving through the St. Louis-East St. Louis gateway or West Alton and that wherever the West Side Lines bear the cost of the transfer charges across the river, said West Side Lines are fully compensated by the amounts received by them for their services in connection with such through traffic and that if the amounts received by either the East Side or West Side Lines are in any way unfair, unjust or inequitable, such unfairness, injustice and inequality arises because the West Side Lines receive greater amounts than they are fairly entitled to."

(Original transcript—omitted in printing—1397.)

At the hearing before the Commission the complainant West Side Lines insisted on confining the inquiry to the allegations of the complaint, which related to a matter of practice only. (Rec., pp. 184 to 198.) The following statement of counsel for complainants is typical:

> "We are complaining as to through traffic, west bound and east bound, whether it moves on combina-

> tion of locals or whether it moves under through joint rates. The question of the rates and divisions has nothing to do with a proper practice regarding the interchange of traffic. It is distinct and separate, and our complaint relates only to the matter of reasonable rules and regulations governing interchange between carriers at a terminal owned by all of them." (Rec., p. 185.)

The opinion of the Commission is Exhibit No. 1 to the Bill of Complaint in the court below, printed in the Record beginning at page 15, and the order of the Commission as corrected begins at page 27. The Commission passed upon the matter solely as a practice matter. However, the Commission did say:

> "With respect to west bound traffic moving on joint rates, we are not convinced that the reception for a number of years by the West Side Lines of divisions of such joint rates in which the transfer charge was included does not constitute an acquiescence by the West Side Lines in such divisions which is tantamount to an agreement on their part to pay the transfer charge on such traffic. As to traffic moving under joint rates, therefore, we are not prepared at this time to make a definite finding upon the issues and record before us." (Rec., p. 26.)

Chairman Eastman, with whom concurred Commissioners Hall and Woodlock, dissented from the majority, their dissenting opinion being Exhibit No. 5 to the Bill of Complaint. (Rec., p. 56.) They thought the conditions of which complaint is made did not constitute a practice within the meaning of the Interstate Commerce Act, but if it was a practice, the practice complained of was as much a practice of the West Side Lines as of the East Side Lines, and that there was no evidence that the practice was unrea-

sonable. The opinion of the Commission is reported in 113 I. C. C. Reports 681.

The order of the Commission was confined to west bound freight traffic passing through both East St. Louis, Ill., and St. Louis, Mo., on combination rates which are the same on St. Louis as on East St. Louis, and required the defendants to abstain from the practice of requiring the complainants to bear the charges for transfer services from East St. Louis, Ill., to St. Louis, Mo., on such traffic, and to establish upon notice to the Commission, filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act and thereafter to maintain and apply to such freight traffic "the practice of bearing or absorbing on such traffic the charges for transfer services from defendants' lines in East St. Louis, Ill., to the lines of complainants, or of the Chicago, Burlington & Quincy Railroad Company or the Wabash Railway Company in St. Louis, Mo."

The effective date of the order of the Commission was postponed to December 11, 1926, copy of the extension order being set out as Exhibit No. 2 to the Bill of Complaint below. (Rec., p. 30.)

PROCEEDINGS BEFORE THE DISTRICT COURT

On November 12, 1926, the Appellants, plaintiffs below, East Side Lines, filed their bill in equity against the United States of America to have set aside and annulled the order of the Commission. The printed Bill is found at page one of the printed record. The Bill after describing the plaintiffs and referring to the orders of the Commission which are exhibits to the Bill, and the designation of the complainants before the Commission sets out in Paragraph IV (Rec., p. 4) the allegations of the complaint before the Commission; in Paragraphs V to VIII inclusive the proceedings before the Commission, and in Paragraph IX the

dissenting opinion of Chairman Eastman and Commissioners Hall and Woodlock. In Paragraph X it is alleged that the order applies only to west bound traffic on combination rates and that the rates of the plaintiffs lawfully applicable to such traffic apply only to East St. Louis and the rates of the West Side Lines apply from East St. Louis. Plaintiffs' rates do not cover and never have covered the services rendered by the transfer or terminal companies between East St. Louis and St. Louis, and that the rates of the West Side Lines have since 1877 covered the services rendered by such transfer or terminal companies. The historical reason for this situation is set out in Paragraph XI (Rec., pp. 7-8-9) as due to the fact that in 1877 the Chicago & Alton completed its line to East St. Louis from the West by coming down the East bank of the Mississippi River from Louisiana, making East St. Louis via its route intermediate to and from St. Louis and thereby applying the same rates on St. Louis as East St. Louis, and that the West Side Lines to meet this competition then and have ever since applied their rates to and from St. Louis also to and from East St. Louis, and that thereby they have undertaken since 1877 to provide and pay for transportation services necessary under those rates from East St. Louis on through west bound traffic, and that that is not a "practice" within the meaning of that word as used in the Interstate Commerce Act, but if it were a "practice," would be a practice not of the plaintiffs but of the West Side Lines, voluntarily established and voluntarily maintained by them since 1877. In the next paragraph it is alleged that the Interstate Commerce Commission misconceived and misconstrued the meaning of the word "practice" as used in the Interstate Commerce Act; that its opinion and order is based on a mistake of law and therefore null and void and beyond the power of the Commission.

In Paragraph XIII (Rec., p. 10) it is alleged that the order of the Interstate Commerce Commission does not require any change in the manner of handling or transporting through west bound traffic; does not affect in the slightest degree the method in which the actual physical exchange of traffic is made between the plaintiffs and the West Side Lines; that if the order is permitted to take effect the west bound traffic will be handled in exactly the same manner as now; that the order goes solely to the apportionment of revenue, and that its sole and only effect is to reduce the plaintiffs' shares or divisions of the through combination rates lawfully applicable to such traffic by the amount of the charges of the terminal or transfer companies, and to increase to that extent the shares or divisions of the West Side Lines; while the order of the Commission purports to require a change in practice it really deals solely with the shares or divisions of rates, reduced on the one hand and increased on the other, as above stated; that the complaint before the Commission did not attack or deal with the reasonableness of such shares or divisions; that there was no hearing with respect to the reasonableness thereof and no evidence introduced tending to show that they were unreasonable, and that there was no finding made by the Commission in that respect and in consequence the order is beyond the jurisdiction of the Commission and null and void.

By Paragraph XIV attention is called to the fact that while no order was made with respect to traffic handled under joint through rates, the Commission undertook to keep the proceeding alive with respect to such traffic without being prepared at the time to make a definite finding.

By Paragraph XV (Rec., p. 12) it is alleged that even if it be conceded that the payment by the West Side Lines of the transfer charges out of the rates of the West Side Lines voluntarily established is a "practice" within the

meaning of the Act, there was no evidence before the Commission enabling it to determine whether the rates or divisions of the plaintiffs applying up to East St. Louis on through west bound traffic should be reduced by the amount of the charges of the terminal or transfer companies, and the rates or divisions of the West Side Lines increased, or that would support or tend to support a finding of the Commission that such alleged "practice" was in any respect unjust and unreasonable.

It is averred in Paragraph XVI (Rec., p. 13) that the order of the Commission is unlawful and void upon the following grounds:

> "(1) That which is declared by the Interstate Commerce Commission in its report and order to constitute a 'practice' is not a 'practice' within the meaning of that word as used in the Interstate Commerce Act.
>
> "(2) The Interstate Commerce Commission has no power under the sections of the Interstate Commerce Act referred to in its report or any other sections of said Act, to make the said order. The order of the Interstate Commerce Commission exceeds the statutory power conferred upon the Interstate Commerce Commission by the Interstate Commerce Act.
>
> "(3) If the facts set out in the report of the Interstate Commerce Commission constitute a 'practice' within the meaning of that word as used in the Interstate Commerce Act there was no evidence before the Interstate Commerce Commission in said cause which would enable the Commission to determine whether such 'practice' was in any respect unreasonable or unjust, or would support or tend to support the finding of the Interstate Commerce Commission that such 'practice' was unjust and unreasonable.
>
> "(4) The order of the Interstate Commerce Commission is without any evidence to support it.
>
> "(5) The order of the Interstate Commerce Commission is arbitrary.

"(6) The order of the Interstate Commerce Commission, based as—is upon a misconception of the Interstate Commerce Act and an erroneous construction of that Act deprives the plaintiffs herein of their property without due process of law and is in contravention of the constitution of the United States and particularly the Fifth Amendment thereto."

An answer was filed by the defendant in that cause (Rec., p. 59) denying everything that conflicted with the opinion of the Commission, particularly denying all the allegations of Paragraph XVI, and further answering alleged that the matters were fully heard and determined by the Commission and were within its power and authority to hear and determine and in its report made after full hearing together with its order were fully considered and foreclosed by findings of fact based on substantial evidence.

The Interstate Commerce Commission intervened and filed answer. (Rec., p. 62.) It is alleged that its findings and conclusions were fully supported and justified by the evidence which it considered and weighed carefully in the light of its own knowledge and experience including matters covered by the Bill of Complaint; that its order was not made arbitrarily, or unjustly, or contrary to the evidence, or without evidence to support it, and that the Commission did not exceed its authority or exercise that authority in any unreasonable manner, denying all allegations to the contrary.

The West Side Lines, complainants before the Commission, also intervened and filed their answer. (Rec., p. 65.) Intervenors admitted the allegations in Paragraphs I to IX inclusive of the Bill. They admitted also that plaintiffs were common carriers subject to the Interstate Commerce Act; that the order of the Commission applied to west bound traffic but allege that it applies only to traffic moving on combination rates which are the same on St. Louis

as East St. Louis, and deny that the question of plaintiffs' rates to East St. Louis is in issue as set out and pleaded in said Paragraph X. They deny that they voluntarily published to and from East St. Louis the same rates as to and from St. Louis as to west bound traffic, but allege that they have borne the charges of the Terminal on both east and west bound traffic because forced to do so account of the arbitrary action of the Terminal Association which the plaintiffs through stock ownership control. They further deny that if the payment by the West Side Lines of the transfer charges be not a practice that the Commission is without power to make the order complained of; deny that the Commission has misconceived the meaning of the word "practice"; deny that the order is based upon a mistake of law and is null and void. They allege that the question of reasonableness of the transfer charge or the apportionment of those charges is not in issue, but that the plaintiffs having voluntarily extended their lines to St. Louis through use of the rails of the Terminal are required by the order to deliver west bound through traffic to the intervenors at the end of plaintiffs' rails in St. Louis, Missouri. They also deny that the question of whether the rates of the plaintiffs applying to East St. Louis should be reduced is not in issue, but that plaintiffs through their subsidiary the Terminal have voluntarily extended their rails to St. Louis, and that the order of the Commission only covers transfer charges on west bound traffic on which the rates are combination rates the same on St. Louis and East St. Louis.

The cause was heard November 29, 1926, before Circuit Judge Hon. Albert B. Anderson, and District Judges Hon. James H. Wilkerson and Hon. Adam C. Cliffe. Stipulations were made as to exhibits to the Bill of Complaint and to copies of the dissenting opinion of the Commission in Docket 16697 and of the order of the Commission in that

docket number. It was also stipulated that the cause be submitted on final hearing on the pleadings and the certified copy of the evidence before the Commission which was introduced and as reduced to narrative form appears at Record, pages 75 et seq.

The correctness of the statement, substitution of the narrative for the oral testimony and transmittal of the original exhibits is covered by stipulations of all parties (Rec., p. 73) and approved by the court. (Rec., p. 616.)

On December 8, 1926, the court ordered the Bill of Complaint dismissed for want of equity without filing a written opinion. (Rec., p. 68.)

Petition for appeal was filed February 5, 1927 (Rec., p. 69), with assignment of errors (Rec., p. 70) and on same day appeal was allowed. (Rec., p. 72.) The time for filing record in the Supreme Court was extended from time to time until July 30, 1927. (Rec., pp. 617 to 620.) The record was filed July 28, 1927, and with it a stipulation as to printing record and exhibits. (Rec., p. 622.) All the exhibits are before the court. By this stipulation many thereof are not printed. Of those not printed ten copies of thirteen of the exhibits have been supplied to be bound in ten separate volumes for the use of the court.

The assignments of error are at pages 70 and 71 of the printed record. They constitute the basis for the statement of points to be relied upon under Paragraph 9 of Rule 11, found at pages 624 and 625, to show the error of the court below in dismissing the Bill of Complaint which sought to have the order of the Interstate Commerce Commission in its Docket No. 16697 adjudicated unlawful and void:

> 1st. Said order of the Interstate Commerce Commission was without any substantial evidence to support it and was arbitrary.

2nd. That which was declared by said Interstate Commerce Commission in its said order to constitute a "practice" is not a "practice" within the meaning of that word as used in the Interstate Commerce Act.

3rd. The Interstate Commerce Commission had no power under the sections of the Interstate Commerce Act referred to in its said report, or otherwise, to make the said order.

4th. The controversy before said Interstate Commerce Commission in its said docket was one involving rates and divisions of through rates, and not one involving a "practice" within the meaning of that word as used in the Interstate Commerce Act.

5th. The Interstate Commerce Commission had no substantial evidence before it to support its order changing rates and divisions of through rates.

6th. Said Interstate Commerce Commission disregarded the various elements, which by the terms of the Interstate Commerce Act, said Commission is required to consider in a case which involves rates and divisions.

7th. Even if that which was declared by the Interstate Commerce Commission in its report and order as constituting a "practice" was a "practice," the said Commission had no substantial evidence before it to support its finding that the "practice" was unjust and unreasonable.

8th. That which the Interstate Commerce Commission condemned as a "practice" was a "practice" for which the West Side Lines and not the East Side Lines were responsible.

9th. The action of the Interstate Commerce Commission was based upon an erroneous construction of the Interstate Commerce Act, and deprives the plaintiffs herein of their property without due process of law, and is in contravention of the Constitution of the United States, and particularly the Fifth Amendment thereto.

10th. Said District Court erred in failing to render a decree enjoining, setting aside, annulling and sus-

pending the order of the Interstate Commerce Commission in the proceeding before it in its Docket No. 16697, bearing date July 12, 1926, and permanently enjoining the enforcement of said order.

EVIDENCE

The history of the St. Louis rate situation is given to some extent by Assistant Freight Traffic Manager Stanage of the St. Louis-San Francisco Railway at pages 87 to 90 of the Record. It is given in greater detail by witnesses fo. the East Side Lines, General Traffic Manager Sudborough of the Pennsylvania at pages 253 to 257 and by Vice President Maxwell of the Wabash at pages 265 to 268; 274 to 275. As to this testimony it was said by Mr. Robert N. Nash, Assistant Freight Traffic Manager of the Frisco, witness for the West Side Lines: "Mr. Maxwell and Mr. Sudborough have given a very thorough and complete historical sketch of the rate situation and I have no criticism to make of any of the facts presented by them."

Generally speaking, but subject to exceptions to be hereafter noted, the rails of the West Side Lines terminate at St. Louis, Missouri and the rails of the East Side Lines at East St. Louis, Illinois. Up to 1877 this was true without exception. Prior to 1877 the rails of the West Side Lines did not extend to East St. Louis, nor of the East Side Lines to St. Louis. Each made rates to the end of the line to which had to be added the cost of transfer across the river. Prior to 1877 the rates on through traffic passing through the East-St. Louis-St. Louis Gateway were constructed by adding together the rates to or from East St. Louis of the carriers whose rails terminated at East St. Louis, the transfer charge for the crossing of the Mississippi River, and the rates to or from St. Louis of the West Side Lines whose rails terminated at St. Louis, that is to say, prior to 1877 the rates on through westbound

freight traffic were made up of three factors; namely, the rates of the East Side Lines to East St. Louis, the charge for the transfer of the traffic from East St. Louis to St. Louis, and the rates of the West Side Lines applying from St. Louis.

In 1877 this method of constructing the rates was changed by reason of the entrance into East St. Louis of the Chicago & Alton Railroad Company. The Chicago & Alton Railroad Company during that year completed its line of railroad from Kansas City, Missouri to East St. Louis, Illinois, by way of Louisiana, Missouri, and thence down the east bank of the Mississippi River to East St. Louis, Illinois. Now it can readily be seen that if the Chicago & Alton Railroad Company was to participate in the movement of freight traffic between St. Louis and the West and the Southwest such traffic would have to move to or from St. Louis by way of East St. Louis. As the Chicago & Alton could not carry higher rates to or from East St. Louis than it carried to or from St. Louis, it established from East St. Louis the same rates that the West Side Lines then maintained to and from St. Louis. Thus when through traffic destined to points west of St. Louis was delivered by the East Side Lines at East St. Louis to the Chicago & Alton Railroad Company the through charges on such traffic were made up of the rates of the East Side Lines up to East St. Louis and the rates of the Chicago & Alton Railroad Company beyond and were less by the amount of the charge for the transportation of such traffic from East St. Louis to St. Louis than the through charges would be had that traffic been carried across the river by the transfer or terminal companies to St. Louis and there delivered to a West Side Line for movement to destination. To meet this competition of the Chicago & Alton Railroad Company the West Side Lines, whose rails extended only to St. Louis, voluntarily published in 1877 the same rates

to and from East St. Louis that they had established to and from St. Louis to the end that the rates on through traffic moving over their rails would be no higher than the rates on such traffic when moving over the rails of the Chicago & Alton Railroad.

The West Side Lines have ever since 1877 published and applied to and from East St. Louis the rates that they published and applied to and from St. Louis and have ever since 1877 paid out of the rates which they thus voluntarily published to and from East St. Louis the charges for the services rendered by such transfer or terminal companies as move traffic between East St. Louis and St. Louis. The rates on through traffic have ever since 1877 broken on East St. Louis irrespective of whether the traffic was eastbound or westbound, with the exception of traffic destined to or originating in a territory of limited extent lying within what is known as the hundred mile zone.

No like change has ever occurred with respect to St. Louis, Mo.; that is, no eastern line has ever entered East St. Louis, Ill., by way of St. Louis, Mo. The West Side Lines made no objection to this bearing of the bridge toll on through traffic in both directions until after the application by the East Side Lines of the same rates to and from St. Louis and East St. Louis.

During 1906 and 1907, in compliance with a demand made by the business interests of St. Louis, Mo., through what was then known as the Municipal Bridge and Terminals Commission, joint through rates were published by the East Side Lines to and from St. Louis, Mo., which were slightly higher than the rates in effect to and from East St. Louis, Ill. This readjustment did not satisfy the St. Louis business interests and finally the East Side Lines in compliance with the insistent demands of said Commission published the same joint through rates from and to St. Louis, Mo., as from and to East St. Louis, except between St. Louis

and points within a radius of 100 miles from East St. Louis. This was accomplished by reducing all of the rates from and to St. Louis, Mo., and in some but not all cases, slightly advancing the rates from and to East St. Louis, Ill. This caused an appreciable loss in the revenues of the East Side Lines, because the slight advances in the rates to and from East St. Louis did not afford the East Side Lines anything like adequate compensation on account of such loss.

The increase of the East St. Louis rates was from 116 per cent. to 117 per cent. of the New York-Chicago rates, amounting to the following advances in East St. Louis rates, (Rec., pp. 266 and 273):

Classes	1	2	3	4	5	6
Cents	1	½	½	½	0	0

At the present time the difference between 116 per cent. and 117 per cent. is:

Classes	1	2	3	4	5	6
Cents	1½	1	1	½	½	½

Present bridge tolls:

Classes	1	2	3	4	5	6
Cents	5	5	5	3.1	3.1	2.7

(Rec., p. 389.)

All the negotiations between the railroads and the Municipal Bridge and Terminals Commission concerned solely the question of rates between St. Louis, Mo., and certain points east of the Mississippi River. It was never understood that the reduction in said rates to and from St. Louis, Mo. would affect in any manner whatsoever the basis for making and dividing rates applicable to traffic moving between points east of the Mississippi River, and points west

of the river. (Rec., pp. 258 and 408.) All east-bank points from East St. Louis to East Dubuque likewise became basing points and have so continued from 1877 until the present time.

No objection was made by the West Side Lines to the payment of the bridge tolls between St. Louis and East St. Louis on through business in both directions until after the "putting of St. Louis on the map" by giving it the same rates as East St. Louis to and from the East outside of the hundred mile zone, which was done as a result of the pressure of the Municipal Bridge and Terminals Commission of St. Louis and for the benefit of the St. Louis interests. St. Louis was not concerned with the divisions between the carriers on through business.

There are separate switching districts on each side of the Mississippi River at St. Louis, Mo. and at East St. Louis, Ill. defined in tariff publications. The outlines or boundaries of either switching district do not coincide or intersect at any point and the Mississippi River flows between the two. The practice with respect to the absorption of intermediate switching charges is not the same within the East St. Louis, Ill. switching district as it is in the St. Louis, Mo. district. In East St. Louis the receiving line absorbs the intermediate switching charges; in St. Louis generally the delivering line absorbs it. East St. Louis, Ill. and St. Louis, Mo. are separate municipalities in different states and separate industrial communities. (Rec., pp. 260-261.)

Immediately following the extension of the East St. Louis rates to St. Louis, the East Side Lines by appropriate publication confined those rates to local business and prevented their application to through business, except where thereby the combination on St. Louis was made less than the combination on East St. Louis. (Rec., pp. 551-552, 572.)

The form has changed from time to time, but since 1917 the note carried in all the tariffs is as follows:

> "In the absence of through rates on traffic to points west of the Mississippi river, from points named herein, routed via St. Louis, Missouri, through rates will be made on the East St. Louis combination, except when the combination of rates filed with the Interstate Commerce Commission on St. Louis, Missouri, is lower, in which case the St. Louis, Missouri, combination rate will apply. This rule will not apply via the C. B. & Q. Nothing in this item is to prevent the application of an existing lower combination via the route of movement."

This note in substance was drawn by the Chief of the Bureau of Tariffs of the Interstate Commerce Commission, and published on short notice by permission of the Commission. (Rec., pp. 261-264.)

In addition to the Chicago & Alton, at the present time other western lines have their yards and tracks in East St. Louis. The Wabash and the Chicago, Burlington & Quincy compete with the Alton to the West. The Cotton Belt (St. Louis-Southwestern Ry. Co.) and the East Side Line of the Missouri Pacific to the Southwest, are in exactly the same situation as the Chicago & Alton; that is, they cross the Mississippi River below at Thebes and reach St. Louis by first passing through East St. Louis, making the latter point intermediate to and from destinations and points of origin beyond Thebes. The Illinois Central reaches St. Louis through East St. Louis and the Southwest through its connections and controlled lines at lower river crossings. The Missouri Pacific also has its own transfer across the river by ferry, the Ivory transfer, from Carondolet in the St. Louis switching district to Dupo on the East side of the river. (Rec., pp. 292-3, 297, 338-358, 260-261.) Because of this competition between the western

and southwestern lines on the East bank of the river, other western lines at St. Louis are compelled to maintain a rate parity between St. Louis and East St. Louis outside of the hundred mile zone. It is of controlling effect today. See testimony of Mr. R. N. Nash, Asst. Freight Traffic Manager of the St. Louis-San Francisco Ry. Co. (Rec., pp. 354-356.) A statement to the same effect was made by Mr. F. A. Adams, Asst. to the Freight Traffic Manager of the C. R. I. & P. (Rec., p. 370.)

The West Side Lines to sustain their position offered evidence on the following points only:

(a) Evidence to show the physical situation at St. Louis and East St. Louis, and the method of handling business between the carriers. (Rec., pp. 76-81, 90-91, 252.) A part of this evidence consists of extracts from the report of an engineers' committee to the chairman of the Terminal Committee of the Chamber of Commerce, Exhibit 4, copies of which are in the volumes of separate exhibits outside the printed record. Pages 5 and 6 thereof show fifteen proprietary companies including the Iron Mountain, now a part of the Missouri Pacific, and twelve lines not proprietors, including among others, the Mobile & Ohio, Chicago & Eastern Illinois, and Toledo, St. Louis and Western. (Exhibit, pp. 5 and 6.) The non-proprietors are on an equal basis with the proprietors, each railroad being on a par with all other railroads, irrespective of its interest in the Terminal. (Exhibit, p. 21, first column. Also complainants' Exhibit 58, Rec., p. 535.) The West Side Lines also introduced the final decree in *United States v. Terminal Railroad Association of St. Louis,* Exhibit No. 50, p. 524, and copies of the agreements between the Terminal Association and proprietary companies, Exhibit No. 51, to be found in the volumes of exhibits outside the printed record. Reference particularly was made to the provision of that agreement for the enjoyment of equal use

without discrimination, as having a bearing on the present controversy. The agreement was made in 1889 when the West Side Lines were paying without objection the transfer charges in both directions, and must be construed in the light of the situation then existing. Freight is handled by the Terminal with its own power between railroads, and no change in method of physical handling is contemplated by the West Side Lines, nor would it be practical so to do. (Rec., pp. 199, 252.) What is wanted by the West Side Lines is more money, not change of method. (Rec., pp. 100, 321, 347, 363, 375.)

(b) Evidence to show the efforts of the West Side Lines to change the so-called "practice" of the West Side Lines bearing transfer charges in both directions. (Rec., pp. 91, 94, 95, 96.) While it was said that efforts began in 1905, the record is clear that at that date there was only a suggestion by the President of an East Side Line (Rec., p. 492, Exhibit 9), which suggestion was repudiated by the West Side Lines January 17, 1906. (Rec., p. 549.) Documentary evidence was presented in copies of letters contained in Exhibit 5, beginning at page 393 of the printed record. While in 1908 the subject of transfer charges was mentioned, the principal controversy related to transit arrangements on grain and grain products. (Rec., p. 268.) From 1908 to 1914 there was only one letter, that of July 20, 1911, (Rec., p. 419), which resulted in no meeting. (Rec., p. 92.) In 1914 the West Side Lines attempted to change the practice by refusing to pay transfer charges on eastbound through business, not westbound, as now claimed. The West Side Lines rescinded their action under protest and appealed to Commissioner Harlan of the Interstate Commerce Commission, who on June 16, 1915 advised of the necessity of a formal submission of the matter to the Commission. (Rec., p. 459.) President McChesney of the Terminal had previously given the same advice, November

30, 1914. (Rec., pp. 461-4.) A joint committee of the East Side and West Side Lines, known as the Powell Committee, was appointed October 30, 1915 and met November 8, 1915 to outline a program of investigation. (Rec., p. 467.) Its full report dated January 10, 1916 is Exhibit 59, pages 536 to 613 of the record. On April 9, 1917 a committee of five was determined on to analyze the Powell report. (Rec., pp. 475-477.) The four representatives of the lines involved could not agree on a fifth member, but did agree on a recommendation to submit the matter to the Interstate Commerce Commission. (Rec., p. 479.) During federal control Director General Payne instructed that the matter be held in suspense. Following federal control the West Side Lines instead of following the recommendation of the committee, instituted litigation in the nature of contempt proceedings against the Terminal and the East Side Lines, terminating in the decision of this Court in *Terminal Railroad Association of St. Louis* v. *United States*, 266 U. S. 17.

(c) Evidence to show that St. Louis was regarded as a station of the East Side Lines by advertisements, tariffs and bills of lading. (Rec., pp. 82-86, 96-104, 182-183, 205-206, 211-218, 240.)

(d) Evidence to show the method of interchange at other points throughout the United States. (Rec., pp. 104, 182, 207-211, 220-234, 238-239, 362-363, 375, 385-6.) This evidence shows that where there is interchange between carriers within the limits of a city or switching district, the expense of reciprocal interchange is divided in various ways. At most points by the delivering line assuming the expense; at other points by the receiving line bearing the expense, as at East St. Louis; at others by pooling arrangements between the carriers. Occasionally one carrier will assume the expense in both directions, as does the Illinois Traction System at St. Louis. (Rec., pp. 153-156.) The

testimony did not cover any situation comparable to that at St. Louis-East St. Louis where cars had to be transported between carriers from one switching district to another switching district, or across a great river, or where the rates broke at one point and the intermediate transportation took place between that point and another.

(e) Evidence to show the extent of transfer business between St. Louis and East St. Louis and the amount of charges paid by the West Side Lines for such transfer in each direction. (Rec., pp. 183, 203-205, 242-251.)

(f) Evidence to show the difference between present situation and that in 1877. (Rec., pp. 94-95.) The organization of the Terminal, the making of St. Louis a station by the Eastern lines, the permission under the Interstate Commerce Act of the shipper to route his freight, and the decisions of the Supreme Court in the Sherman Act case by the Government against the Terminal Railroad Association, reported in 224 and 236, U. S., were claimed to establish that the rails of the Terminal were in effect the rails of the proprietary lines and other lines using the Terminal.

(g) Evidence to show the fact that the East Side Lines allowed the Terminal a reclaim on westbound cars. (Rec., pp. 234-236, 241.)

(h) Evidence to show that interchange of passengers, mail and express between the East Side and West Side Lines is at St. Louis. (Rec., p. 200.)

Counsel for the West Side Lines were insistent and successful in their insistence, that the evidence of their witnesses even on cross-examination be limited to a consideration of the question from the point of view of "practice," and that no consideration whatsoever should be given to the question of rates or divisions of rates. (Rec., pp. 184-190, 198.)

The defendants after unsuccessfully moving to dismiss the complaint (Rec., p. 253) offered their evidence setting

out the history of the rate situation as heretofore given, and more specifically the basis and history of through rates between the various rate territories East and West, on traffic between points East and West of the Mississippi River when passing through East St. Louis or other river crossings. Between some territories the traffic moves on joint through rates and agreed divisions, the said divisions being invariably made with reference to the east bank of the river, whether the traffic crosses the river at the St. Louis gateway or at other crossings. (Rec., pp. 274, 278-282, 291, 298, 311, 321.) Other traffic moves on combination rates involving proportional rates less than locals, either West or East of the river, or both, which proportionals are made to or from East St. Louis, so that the East St. Louis combination is the lowest combination. (Rec., pp. 276-7.) A small amount involving the 100 mile zone territory moves on combinations of local rates which are lower on St. Louis than on East St. Louis, or vice versa. (Rec., p. 285.) The balance moves on combination of local rates to and from East St. Louis where the combination is the same as would be to and from St. Louis, but the East St. Louis combination has been used because of the note in the tariffs of the East Side Lines confining the East St. Louis rates to such combinations. (Rec., pp. 261, 390.) The West Side Lines in making proportionals to equalize rates via other routes have made their proportionals to and from East St. Louis. (Rec., pp. 277, 339.) They have even extended their rates to and from western points well into Illinois, giving Mississippi River rates to such interior points as Galesburg, Chapin and Beardstown. (Rec., p. 285; Exhibit No. 63.) The joint rate committee agreement of 1889 (Rec., pp. 272, 290), Exhibit page 604, provides for the East St. Louis basis of rates as divisions of through rates at all East Mississippi River points between East St. Louis and East Dubuque, which agreement

is still in force and insisted upon by the West Side Lines. (Exhibit No. 60, p. 613.)

Following federal control in 1920 both East and West Side Lines presented evidence to the Interstate Commerce Commission as a basis for advances of rates in the Eastern and Western groups respectively, treating the moneys paid to the Terminal Railroad Association as expense and not as revenue. The needs of the western roads to produce the necessary six per cent under the new law were measured by the revenue retained by them after their payment for the river transfer, and the necessities of the eastern roads were based on their revenues after the deduction of the small part of the cost of the river transfer paid by them, and both sets of carriers were awarded increases supposedly sufficient to bring their revenue up to six per cent. If the cost of the river transfer be now shifted, it will result in the western carriers getting much more than the increases awarded to them in Ex Parte 74, and the eastern carriers will get less. The situation is similar in so far as these bridge tolls being shown as expenses by the western roads in their application for an increase of freight rates under Ex Parte 87, which was in course of hearing at the time testimony was given in 16697. (Rec., pp. 287-289.)

The Cotton Belt and Missouri Pacific have their own rails into East St. Louis on the east bank to Thebes, and are begging for southwestern business, and prefer to handle with their own facilities rather than by the Terminal Railroad at St. Louis. (Rec., p. 292.) The Chicago and Alton and the C. B. & Q. are at East St. Louis with their own rails begging for western business which they do not handle through St. Louis but via Alton and via Louisiana. The Wabash is at East St. Louis begging for western business on the same terms as the Chicago and Alton and C. B. & Q. The Frisco and M.-K. & T. have a competitive condition

which they have had to meet and that is the reason they have met it. The Rock Island and Wabash and Missouri Pacific have had a competitive situation with the Chicago and Alton and Burlington which they have been obliged to meet all these years, and the western roads have, or should have known, that they must take care of this service and provide for it in their rates. (Rec., p. 293.) It was shown that of the business interchanged between the Wabash and the Missouri Pacific destined to or originating at points in southwestern territory, 85 per cent of the cars received from the Missouri Pacific by the Wabash, and 76 per cent of the cars delivered to the Missouri Pacific by the Wabash were handled wholly on the east side of the river without crossing the river at St. Louis. (Rec., p. 297.)

East St. Louis has been the interchange point ever since 1877, and the general custom there is the same as it is throughout the United States; that is, the intermediate expense at East St. Louis is borne equally by the receiving and delivering lines. (Rec., p. 292.) Instances of recent recognition of the east bank of the Mississippi River as the interchange point by the western lines voluntarily, or by the Interstate Commerce Commission, are noted at pages 279, 282, 305 and 317 of the record. Putting St. Louis on the map, i. e., equalizing its rates with East St. Louis in 1908, never cost the western roads one dollar, but the eastern roads were obliged to make a lower basis of rates from Central Freight Association and Trunk Line and New England territories. (Rec., p. 296.) The western lines have never made a request for divisions on St. Louis. (Rec., pp. 261, 298, 299.)

Through business from the Southeast through St. Louis and East St. Louis moves on joint through rates or proportional rates, including the Mississippi Valley, which divide on East St. Louis by agreed percentages or specific proportions. (Rec., pp. 298, 304.) The southern and south-

eastern lines take care of the Ohio River bridge tolls, and the western lines take care of the St. Louis bridge tolls. The southeastern lines do not pay the bridge toll at any point across the Mississippi River at St. Louis or south thereof. (Rec., pp. 304-306, 317.)

At the Ohio River crossing at Cincinnati, Ohio-Covington, Kentucky, the rates of the northern carriers are the same to and from Covington as Cincinnati, and the rates of the southern carriers are the same to and from each point. The southern lines pay the bridge tolls in both directions. The southern lines' rates usually break on the north bank, because they carry the south bank to the north bank to equalize competition between other crossings. At Louisville all the interchange is practically done on the south side of the river, even though the rates break and divide on the north bank, but the southern lines pay the bridge toll. (Rec., p. 314.)

A disturbance of the present rate adjustment at East St. Louis would disturb and throw into confusion the rate situation at all river crossings north thereof and would affect the readjustment of rates at Ohio River crossings. (Rec., pp. 390-392.)

The complainants in rebuttal offered evidence that there was no agreement on the part of the M.-K. & T. Railroad or other western lines that there would be no change in the making of through rates or in the division of rates with the eastern lines as a consequence of the eastern lines extending their rates to St. Louis. The fact that the West Side Lines had to pay a toll to reach East St. Louis was never given consideration in fixing rates to and from St. Louis. State rates in Missouri to and from St. Louis are made by the Missouri Commission, and the Missouri Commission would not increase St. Louis rates to provide a bridge toll to East St. Louis. (Rec., pp. 324, 348-9.) Competition and commissions' decisions also prevented increases in St.

Louis rates. (Rec., pp. 354-360.) Even when the Commission authorizes higher East St. Louis rates than St. Louis rates to cover bridge tolls the western carriers because of this competition can not avail themselves thereof. (Rec., pp. 359 and 360.)

Chairman Leland of the Southwestern Freight Bureau gave an extended history of joint through rates between Central Freight Association territory and Southwestern territory, which rates divide on East St. Louis, the witness desiring, however, that they should divide by allowing to the C. F. A. lines the figures that they now use to St. Louis instead of East St. Louis. (Rec., pp. 328-339.) East St. Louis rates are maintained on a parity with St. Louis by the southwestern lines to Texas not only because of the competition of the Cotton Belt, but because the rates to Texas are group rates and the St. Louis group is a large group, which goes over into Illinois quite a little ways; goes to Belleville. East St. Louis is one of the points in the group. (Rec., p. 338.) If the witness were testifying in a division case the testimony would be different from that which was offered: "I should have a great deal to say about the volume of the division as compared with the volume of the division. I am not talking about that at all." (Rec., p. 340.)

Exhibit No. 72 (Rec., p. 616) was offered to show history of class rates from a few points in C. F. A. and Eastern territory to St. Louis and East St. Louis. (Rec., p. 341.) The exhibit confirms Mr. Maxwell's testimony. By increase of the percentage in East St. Louis rate from 116 to 117 by the eastern lines in 1908, the eastern lines not only increased the local East St. Louis rate but the rate applicable on that through business on which the eastern lines received their local, and also on all the proportional rates from the East to the upper Mississippi River crossings. While the increase of 117 per cent was only slightly higher

than the previously existing rate to East St. Louis and insufficient to cover Mississippi River transfer, they offset to some extent the reductions which they had to give the St. Louis business interests by the proportions demanded on through traffic from the East and all the upper crossings applicable to Western Trunk Line Territory. (Rec., pp. 340-343, 367.)

The change in tariff note by the East Side Lines to prevent the application of St. Louis rates to through business made in 1915 and corrected in 1917, was a direct result of the efforts of the West Side Lines to compel the East Side Lines to accept east bound traffic at St. Louis. (Rec., pp. 343-344.) Exhibit No. 73 (Rec., p. 616) was offered to show that the East Side Lines got more on through business moving on East St. Louis combinations than they did on business delivered to the public in St. Louis, on which they had to pay a bridge toll. (Rec., p. 345.) By the revision of rates in C. F. A. territory, September, 1917, on a mileage basis in connection with the Disque scale under I. & S. Docket 965, the rates to and from St. Louis were made by using the scale based upon a distance arrived at by adding three miles to the actual East St. Louis mileage, applied to a group of territory east of and adjacent to St. Louis, affording the East Side Lines some compensation for the added distance across the Mississippi River. (Rec., pp. 347-8.) While there is considerable controversy in the record as to whether the Commission's decision in the *Warnock Case*, 21 I. C. C. 546, authorized the western lines to make proportional rates between Missouri River cities and east bank crossings, intending the rates to be applicable from St. Louis or East St. Louis, it is conceded that the western lines did publish the rates to and from East St. Louis and not St. Louis. (Rec., pp. 349-351.) Exhibit No. 74 was offered in connection with this controversy. (Rec., pp. 353-4.) The exhibit at page 616 showing basis

of rates from C. F. A. territory to Iowa cities, shows applications of western lines' proportionals to west bank crossings, Hannibal and north, but to East St. Louis and not St. Louis. Exhibit No. 75 (Rec., p. 616) offered at page 355 shows that to four points mentioned in Missouri, the West Side Lines have made lower rates from St. Louis for some classes of freight than permitted by the Missouri state scale, due to competition with the Chicago and Alton.

Witnesses expressed the opinion that the West Side Lines had no fear of diversion of business from them or to other routes should the Commission make the order which they sought. (Rec., pp. 361, 371.) Exhibit No. 76, also following page 616, was offered as a statement showing comparison of differentials, local rates and arbitraries breaking on East St. Louis on traffic from C. F. A. territory to Southwest. It relates only to joint through rates. At page 362 of the record the witness instances where the shrink of the western lines was greater than the shrink of the eastern lines, but from Detroit and Pittsburgh the shrink of the eastern lines seems to be the greater. However, joint through rates are not now involved.

The testimony of Mr. F. A. Adams, Asst. to the Freight Traffic Manager, C. R. I. & P. Ry. Co., pages 366 to 376, relates almost entirely to joint through rates and divisions thereof. He confirms other witnesses as to the practice of delivering line making delivery throughout the country. His attention being directed by the Examiner to a case of the carriers having two junctions and division sheets providing divisions on one of those junctions and asked whether he thought the divisions ought to be changed so as to make the divisions in effect break on the other junction, the witness thought the practice being shown to be improper it ought to be changed regardless of how the division sheet read, the impropriety in the practice being

that the West Side Lines pay the bridge toll in either direction.

> Q. "On joint rates, you have agreed to it, and your division sheets provide for that.
>
> A. "We are seeking under this complaint here to change that practice."

(Rec., p. 375.)

On cross-examination he conceded that the C. R. I. & P. when it came into St. Louis in 1903 had full knowledge of this situation. (Rec., p. 376.)

Mr. Stanage testified (Rec., pp. 376-383) as to ownership and operation of bridges across the Mississippi River and the Ohio River. As to those north of East St. Louis he testified that there were no transfer or switching lines operating between the line haul carriers on one side of the river and the other; that the carriers serving those river crossings do not publish and file with the Interstate Commerce Commission any tariffs naming separate bridge tolls between the east and west banks, and at none of them is there a meeting of the East and West Side Lines. (Rec., p. 380.) As to the southern crossings he testified that the Interstate Commerce Commission in Docket 12478 authorized the carriers to apply fixed ferry tolls for the trans-river service. (Rec., p. 383.) He did not testify as to who bore the bridge tolls either north of East St. Louis or on the Ohio River. Exhibit No. 77 was offered (Rec., p. 387) showing for the year 1924 railway operating revenues, net railway operating revenue, net ton miles per mile of road, for the west side and east side railroads involved in this case. It is the last of the printed exhibits. The miles of road shown did not differentiate between single and double track. The net railway operating income per mile of road is shown regardless of whether a single, double or four track line. The witness did not examine all the figures of

the C. & E. I., and did not know that it is a fact that that company failed to earn its fixed charges.

The foregoing is submitted as a fair summary of all the evidence and the character of evidence introduced on the hearing before the Interstate Commerce Commission, a transcript of which was offered and accepted in the hearing before the court below and constituted the only evidence submitted to the court.

ARGUMENT

It will be convenient to consider the points relied upon by the Appellants (Rec., pp. 624-625) in a somewhat different order from that in which they are there stated. We will therefore begin first with the fourth point.

4th. The controversy before said Interstate Commerce Commission in its said docket was one involving rates and divisions of through rates, and not one involving a "practice" within the meaning of that word as used in the Interstate Commerce Act.

The order in this case purports to change a "practice" and to require the establishment of a reasonable "practice." But what is the "practice" that the Commission in its report finds should be changed and what is the "practice" that the Commission in its order finds should be established?

The Commission in its report finds that the "practice" of the East Side Lines in requiring the West Side Lines to bear the transfer charges on westbound freight traffic moving through St. Louis and East St. Louis on combination rates which are the same on St. Louis as on East St. Louis is unjust and unreasonable. The order of the Commission requires the East Side Lines to establish, upon notice, filing and posting as required by section 6, and

thereafter to maintain and apply to the transportation of westbound freight traffic passing through both East St. Louis, Illinois, and St. Louis, Missouri, on combination rates which are the same on St. Louis as on East St. Louis and delivered to the West Side Lines or the Chicago, Burlington and Quincy or the Wabash the "practice" of bearing or absorbing on such traffic the charges for the transfer services from the lines of the East Side Lines in East St. Louis to the lines of the West Side Lines or of the Burlington or of the Wabash in St. Louis.

In short, the order goes solely to the payment of money in accordance with tariffs to be filed pursuant to that section of the Commerce Act having to do with tariffs of rates, fares and charges. It requires no change in the manner in which through westbound traffic is now handled through the East St. Louis-St. Louis gateway or the manner in which that traffic is interchanged between the East Side Lines and the West Side Lines. The physical operation surrounding the movement of through westbound traffic from the rails of the East Side carriers at East St. Louis to the rails of the east side of the West Side Lines at St. Louis is not required to be changed in any particular by the order and through westbound traffic will be handled and moved from the rails of the East Side Lines at East St. Louis to the rails of the West Side Lines at St. Louis in exactly the same manner as it has been handled and moved for many years. The report and order do not in any respect affect the handling of through westbound traffic as between the East and West Side Lines.

The report of the Commission reads in part as follows:

> "Defendants take the position that the word 'practice' as used in the Act relates only to matters between shippers and carriers and not to questions affecting the handling of traffic between carriers." (Rec., p. 18.)

But where in this case has there been any question affecting the handling of traffic between carriers? In what respect does the order of the Commission require any change in the handling of traffic by the East Side and the West Side Lines?

We direct this court's attention to the fact that the testimony of complainants' own witnesses showed that they did not expect that any change would or could be made in the manner in which through westbound traffic is now interchanged between the East Side Lines and the West Side Lines, whatever might be the order of the Commission. For example, Mr. F. G. Jonah, chief engineer of the St. Louis-San Francisco Railway Company, testified (Rec., p. 252) that it would not be practicable for the East Side Lines to undertake to make deliveries in St. Louis with their own power and he offered in evidence as Complainants' Exhibit 4 extracts from a report to the chairman of the Terminal committee of the St. Louis Chamber of Commerce by an engineers' committee appointed in July, 1920, to investigate among other things the railroad terminal situation in the St. Louis-East St. Louis industrial district, in which report it was stated that,

> "It was manifestly impossible for each railroad to provide terminals on both sides of the river and to provide its own river crossing facilities. Consequently it was natural that one company should develop such facilities for the use of all." (Ex. 4, pp. 6 and 7.)

Mr. B. H. Stanage, assistant freight traffic manager of the St. Louis-San Francisco Railway Company, very clearly brought out in the questions put to him on cross-examination (Rec., p. 199) that the West Side Lines did not contemplate that there would be any change made in the manner through which westbound traffic was interchanged between the East Side and the West Side Lines. The testi-

mony of the witnesses for the West Side Lines who were employed in the traffic department of those lines also made very clear the point that what they sought was an increase in their rates and divisions applicable to through westbound traffic by the amount of the charges of the bridge or terminal companies for the transportation of westbound traffic from East St. Louis to St. Louis and a reduction in the rates and divisions of the East Side Lines applying on such traffic by the amount of such charges. (Witness R. N. Nash, Rec., pp. 347 and 363; witness B. H. Stanage, Rec., p. 100; witness F. A. Adams, Rec., p. 375; witness Columbus Haile, Rec., p. 325.)

It was the revenues that they received out of this through westbound traffic that concerned them and not any sophistical theories respecting "practices."

The finding of the Commission is that the "practice" of the East Side Lines in requiring the West Side Lines to bear the transfer charges on westbound freight traffic moving through St. Louis and East St. Louis on combination rates which are the same on St. Louis as on East St. Louis will be unjust and unreasonable and that the just and reasonable practice with respect to all such traffic will be for the East Side Lines to bear or absorb all such transfer charges. And the order follows this finding.

It requires the East Side Lines to pay out of the revenues derived by them from their rates lawfully applicable to through westbound traffic the charges of the transfer or terminal companies for the transportation of such traffic from East St. Louis to St. Louis and relieves the West Side Lines from the payment of such charges, in the face of the fact that the rates of the East Side Lines lawfully applicable to such traffic do not extend and have never extended to St. Louis and do not cover and have never covered the service rendered by such transfer or terminal companies in moving such traffic from East St. Louis to St.

Louis, and the further fact that the rates of the West Side Lines lawfully applicable to such traffic have extended and extend from East St. Louis and cover and have since 1877 covered the services rendered by the transfer or terminal companies in moving the traffic from East St. Louis to St. Louis. The sole and only effect of the order, therefore, and this was the purpose which the West Side Lines had in mind in bringing the complaint, is to reduce the shares or divisions which the East Side Lines receive of the through combination rates which are not joint rates lawfully applicable to such traffic by the amounts of the charges of the terminal or transfer companies for the services they render in transporting the through westbound traffic from East St. Louis, Illinois, to St. Louis, Missouri, and to increase the shares or divisions of the West Side Lines lawfully applicable to such traffic by the amount of such charges. The complaint had no other purpose and the order has no other result.

Section 6, Paragraph (1) of the Interstate Commerce Act provides:

> "If no joint rate over a through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation."

The note in the tariffs of the East Side Lines drawn by the Chief of the Bureau of Tariffs of the Commission (Rec., pp. 261-262) is a clear compliance with that provision of the act, separately establishing the rates to and from East St. Louis as the rates of the East Side carriers applicable to traffic over through routes to and from points west of the Mississippi River, except where the St. Louis rates become applicable where the combination on St. Louis is lower than on East St. Louis, or except where an existing

lower combination exists via the route of movement. This insures the shipper the lowest possible combination rate. The order of the Commission has the unwarranted effect of compelling the East Side Lines to pay for transportation beyond the destination to which their rate applied, notwithstanding the fact that the tariffs of the West Side Lines declare that those lines hold themselves open to complete the transportation between East St. Louis and western destinations. In other words, it makes the East Side Lines pay for the performance of a duty for which, under the tariffs, the West Side Lines are liable.

The finding and order of the Commission in this case deal solely with the bearing or absorbing of charges, that is, with the payment of money. As the Attorney-Examiner who heard the case for the Interstate Commerce Commission said at the hearing (Rec., p. 189):

> "We know what Mr. Roberts (counsel for the West Side Lines) wants. He wants more money out of it and that is all."

Under the order no "practice" respecting the operating or the physical handling of through westbound freight will be changed. The sole and only effect of the order is to reduce the revenues derived by the East Side Lines from their rates lawfully applicable to through westbound traffic by the amount of the charges of the terminal or transfer companies which transfer the freight from East St. Louis to St. Louis and to increase the revenues received by the West Side Lines from such through westbound traffic by the amount of such charges.

The case may be viewed from another aspect. The through charges on through westbound traffic moving on the combination basis are now divided between the East Side Lines, the Terminal or Transfer Companies, and the

West Side Lines on the following basis: The East Side Lines receive as their earnings on such traffic their rates up to East St. Louis; the Terminal or Transfer Companies receive their charges for the transportation of the freight from East St. Louis to St. Louis; the West Side Lines receive as their earnings on such traffic the rates which they voluntarily established from East St. Louis less the charges of the transfer or terminal companies. The only effect of the order is to reduce the revenues of the East Sides Lines derived from this traffic and increase the revenues of the West Side Lines by the amount of the charges of the transfer or terminal companies. And this is done, as we shall later point out, *without any evidence that the proportions received by the East Side Lines as their earnings on this traffic are unjust and unreasonable when compared with the earnings of the West Side Line when consideration is given to the services performed by the East Side Lines as compared with those performed by the West Side Lines in the transportation of such through westbound traffic.*

Now the Commission itself recognized the essential nature of the controversy between these two sets of carriers when it said in its report:

> "In deciding what would be a reasonable practice primary consideration should be given to *what is a fair method of apportioning the revenue* regardless of the competition of the Alton." (Rec., p. 25.)

That is the real question and the real controversy between these two sets of carriers, *one respecting the apportionment of revenue.* Now there is only one section of the act which deals with the apportionment of revenue between the carriers and that is paragraph 6 of Section 15. The West Side Lines did not choose to bring their complaint under that section but sought to change the apportionment

of revenue as between two sets of carriers in the guise of fixing a "practice."

If the West Side Lines and the Commission are right in their construction of the law there could have been no possible need of the passage by Congress of paragraph 6 of Section 15 which specifically deals with the apportionment of revenue between carriers.

We very earnestly invite the court's attention to the fact that the essential character of this controversy between the East Side and the West Side Lines has been indubitably stamped as a rate and division case by the court itself in a very recent decision. (*Terminal Railroad Assn.* v. *United States*, 266 U. S. 17.)

It will be recalled that the question whether the Terminal Railroad Association of St. Louis and its subsidiaries and certain railroad companies owning the capital stock of the association constituted a combination in violation of the Sherman Act was before the court in *United States* v. *St. Louis Terminal*, 224 U. S. 383 and 236 U. S. 194, that the court indicated what should be done to abolish the obnoxious practices which brought the combination within the inhibition of the statute. Following these decisions of the court decrees were entered in the District Court in accordance with the directions of the Supreme Court.

In 1920 the West Side Lines filed a petition and motion in the District Court to have the Terminal Association, its subsidiaries, the East Side Lines, and their representatives on the board of directors of Terminal adjudged guilty of contempt of court for violating the decree. An examiner was appointed and, after the taking of evidence and the hearing, the court denied the motion to dismiss and entered a decree finding that the East Side Lines and the Terminal were in contempt of the court and were violating the decree in that, among other things, the West Side Lines

were compelled to pay the Terminal its transfer charge for operating and supplying facilities for the interchange of both through eastbound and through westbound traffic between the East Side and the West Side Lines, and, also, in that the East Side Lines were not paying the transfer charges of the Terminal on westbound through traffic. There was an appeal by the East Side Lines and the Terminal to this court which in *Terminal Railroad Association of St. Louis* v. *United States*, 266 U. S. 17 (October 13, 1924), held that the original decree did not require the East Side Lines to pay the charges for transferring through westbound freight; that the suit brought by the United States to prevent restraint of trade did not relate to the liability for transfer charges or to the division of joint rates, that the pleadings presented no issue between the East Side Lines and the West Side Lines. The court, in reversing the decree of the lower court, said:

> "The practice of 'breaking' the rates on westbound through freight at the east bank of the Mississippi River in East St. Louis has prevailed since 1877. That is, joint rates on freight moving from the east through St. Louis to points in the west have been considered as made up of an amount to cover the haul to the east bank of the river and an amount to cover the haul beyond that point. The former has been divided among the carriers hauling to the east bank of the river; the balance among those hauling from that point,—including the Terminal Association and its subsidiaries making the transfer from the lines on the east to the lines on the west side of the river. It has also been the practice at this crossing to 'break' the joint rates on eastbound through freight at the same time. All rates have been set forth by tariffs; and the divisions of the charges among the participating carriers have been shown by their division sheets filed with the Interstate Commerce Commission. The practice has been the same on all competing routes cross-

ing the river at points between East St. Louis and Dubuque.

The making of rates is a legislative and not a judicial function. *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 440; *Ohio Valley Co.* v. *Ben Avon Borough*, 253 U. S. 287, 289; *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298, 305; *Interstate Commerce Commission* v. *Humboldt S. S. Co.*, 224 U. S. 210, 226. The division of joint rates is also legislative in character. *The Interstate Commerce Commission is authorized to establish through routes and joint rates and to prescribe conditions upon which such routes shall be operated, and to fix divisions of such rates among carriers.* Sec. 15 (1), (3), (6), Interstate Commerce Act, 418, c. 91, 41 Stat. 485, 486. *It is well settled as a general rule that the question of the reasonableness of rates or of divisions of joint rates will not be considered by the courts before application has been made to the Commission. Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Robinson* v. *B. & O. R. R. Co.*, 222 U. S. 506; *Mitchell Coal Co.* v. *Pennsylvania Coal Co.*, 230 U. S. 247, 254-261; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562; *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274. The Terminal Association and its subsidiaries are common carriers by railroad and, like the proprietary companies, are subject to regulation by the Commission. *The original decree does not purport to regulate rates or prescribe divisions of joint rates, or fix liability for such transfer charges.* On the other hand, it expressly provides that it shall not affect in any wise or at any time the power of the Commission over charges to be made by the Terminal Association or its subsidiaries, or any power conferred by law upon the Commission. In the exercise of its powers under existing law, *the Commission is untrammeled by the decree and may make and regulate rates on through freight and the divisions thereof.* As the original decree does not prescribe charges or fix divisions of joint rates, contempt proceedings will not

> lie to determine whether the West Side Lines have paid more than their fair share of the charges for the services rendered by the Terminal Association, or to require the East Side Lines to make the payments specified in the decree appealed from."

The West Side Lines seem to be determined either to misconceive or evade the true nature of the controversy between these two sets of carriers. They urged in that litigation that the question whether the West Side Lines or the East Side Lines should pay the transfer charges on through westbound traffic was a matter covered by the decree in the anti-trust litigation. But this Court said it was not, that it was a matter involving rates and divisions and that it was one to be first determined by the Interstate Commerce Commission. They then brought their complaint before the Interstate Commerce Commission but contended that the real controversy was not at all one of rates and divisions as the Supreme Court found, but something else, that is alleged unreasonable "practices." Counsel for the West Side Lines vigorously insisted throughout the hearing before the Interstate Commerce Commission that under the issue raised in the complaint rates and divisions were not involved. (Rec., pp. 99, 184-190, 198, 300, 323.) But the fact remains that this Court has correctly apprehended the true controversy; it is a rate and division case and not a case involving alleged unreasonable "practices." And it must follow that the rates and divisions of the East Side Lines or of the West Side Lines lawfully applicable to this traffic and the revenues derived from such rates and divisions can not be reduced or increased except in a proceeding in which they are brought in issue and the Commission has such facts before it as would support a finding that the earnings of one set of carriers applicable to this traffic should be reduced and the earnings of the other set increased.

That we are right in our contention that the essential controversy between these carriers is one involving rates and divisions is shown by what the Commission itself said and did in its recent report in *Rates, Regulations and Practices of Peoria & Pekin Union Railway Company at Peoria, Ill.*, 115 I. C. C. 469. In that case as in this case there was a controversy between two different sets of carriers, those reaching Peoria from the East and those reaching Peoria from the West as to whose rates and divisions should be shrunk for the purpose of providing compensation to an intermediate switching line, the Peoria & Pekin Union Railway Company, which transported the traffic from the rails of one set of carriers to the rails of the other set. The Commission in that case did not undertake to fix a "practice" which would require the carriers reaching Peoria from the West to absorb certain switching charges out of their rates and divisions which they had not theretofore been required to absorb. The Commission treated it as a rate and division case, saying (p. 512):

> "*Obviously if the Rock Island and Burlington are now required to compensate the Union for its service on eastbound traffic it would result in diminished divisions to them under their present rates and proportions west of Peoria.* The fact that the M. & St. L. was formerly a tenant of the Union does not prove that it should receive revenues on similar traffic lower than the Rock Island and Burlington, particularly in view of its present financial condition.
>
> "Upon this record it appears that on through traffic via Peoria unjust, unreasonable, and inequitable divisions would accrue to the West Side Lines if they were required to absorb the interchange charges of the Union, in either direction, in effecting the transfer between them and the lines serving the Peoria district through East Peoria."

And the Commission required the establishment of joint through rates through the Peoria Gateway, fixed the divisions of those rates and found that under just, reasonable and equitable divisions of the joint through rates the lines reaching Peoria from the East should be required to pay out of their divisions the amount of the transfer charge of the switching line, the Peoria & Pekin Union, *in both directions*. We emphasize the fact that in the Peoria & Pekin Union case the Commission decided in effect that the East Side Lines, that is the lines reaching Peoria from the East, should bear the interchange expense on traffic in both directions. This conclusion could only be reached and was only reached by and after a consideration of the services performed by the East Side Lines on the one hand and the services performed by the West Side Lines on the other in the light of the compensation received by the East Side Lines as compared with that received by the West Side Lines. The question was one of adjusting the compensation to the service in so far as the through rates were concerned and the Commission did not attempt to deal with anything but joint through rates. It required the establishment of joint through rates in all cases in order that it might be in a position to consider and fix the divisions. The reasonableness of the divisions of the East Side Lines at Peoria as compared with those of the West Side Lines at Peoria, was one of the issues in the Peoria & Pekin Union case and as the report of the Commission indicates, there was a great mass of testimony dealing with the issue respecting divisions.

In the present case the complaint before the Interstate Commerce Commission filed by the West Side Lines purported to raise no issue respecting rates and divisions and counsel for the West Side Lines emphasized again and again that under the issues raised in the complaint rates

and divisions were not involved. The Commission itself said in its report:

> "It is sufficient to say that the West Side Lines stated early in the hearing that they desired to submit the case on the issues presented by them and the propriety of the divisions was not made the subject of inquiry and investigation." (Rec., p. 24.)

But just as the essential controversy in the Peoria & Pekin Union case was one involving divisions and was so treated by the Interstate Commerce Commission, so the essential controversy between the East Side and the West Side Lines at St. Louis is one respecting divisions and can be dealt with by the Commission only under those sections of the Interstate Commerce Act which give it jurisdiction over rates and divisions, and only after a consideration of those factors which the law provides must be considered in fixing rates and divisions. The proceedings before the Interstate Commerce Commission in the Peoria & Pekin Union case show very clearly just what must be done and what character of evidence must be introduced in such a controversy as exists between the East and West Side Lines.

A decree holding that the order of the Interstate Commerce Commission entered in this cause is invalid will not deny to the West Side Lines any remedy which they may have under the Interstate Commerce Act if they sincerely believe that their earnings derived from their rates and divisions on through westbound traffic are too low as compared with the earnings of the East Line Lines derived from such traffic, when consideration is given to the respective services performed by the two sets of carriers. It will only require them to proceed in this matter as the statute contemplates and requires they shall proceed. They have a remedy if their case is a meritorious one and this remedy is given them under the statute.

2nd. That which was declared by said Interstate Commerce Commission in its said order to constitute a "practice" is not a "practice" within the meaning of that word as used in the Interstate Commerce Act.

3rd. The Interstate Commerce Commission had no power under the sections of the Interstate Commerce Act referred to in its said report, or otherwise, to make the said order.

The finding of the Commission in its report is as follows:

> "We find that for the future the practice of the East Side Lines in requiring the West Side Lines to bear the transfer charges on westbound freight traffic moving through St. Louis and East St. Louis on combination rates which are the same on St. Louis as on East St. Louis will be unjust and unreasonable, and that the just and reasonable practice with respect to such traffic will be for the East Side Lines to bear or absorb all such transfer charges." (Rec., p. 26.)

And the order of the Commission requires the East Side Lines to establish, maintain and apply to the transportation of westbound freight traffic passing through both East St. Louis and St. Louis on combination rates which are the same on East St. Louis as on St. Louis and delivered to the West Side Lines or the Chicago, Burlington & Quincy Railroad Company or the Wabash Railway Company the "practice" of bearing or absorbing on such traffic the charges for the transfer services from the lines of the East Side Lines in St. Louis to the lines of the West Side Lines or the Chicago, Burlington & Quincy Railroad Company or the Wabash Railway Company in St. Louis.

Our first point is that the fact that the West Side Lines have since 1877 voluntarily published and applied from and to East St. Louis the rates that they have published

and applied from and to St. Louis and have undertaken since 1877 to provide and pay for such transportation services as might be required under the rates which they have voluntarily published and applied from East St. Louis on through westbound traffic is not a "practice" within the meaning of that word as used in the Interstate Commerce Act and within the meaning of that word as it has been construed by the United States Supreme Court. Nor can all the facts and circumstances shown of record or some or any of them be held to be a "practice" within the meaning of that word as used in the act.

The Commission in its report says:

> "Defendants take the position that the word 'practice' as used in the Act relates only to matters between shippers and carriers and not to questions affecting the handling of traffic between carriers. We do not agree with this contention. The word 'practice' as used in Paragraphs (6) and (11) of Section 1 and Paragraph (1) of Section 15 of the Act seems to us clearly to comprehend within its meaning the subject matter here presented. * * *" (Rec., p. 18.)

We invite the court's attention to its decisions construing the meaning of the word "practice" as it appears in Section 15 of the Act (*United States* v. *Pennsylvania Railroad Co.*, 242 U. S. 208). And we believe that we are justified in calling the court's attention to the fact that the Interstate Commerce Commission in reaching the conclusion it did in this case has so far as we have been able to tell ignored the meaning and effect of this decision. It is, however, referred to in the dissenting opinion of Mr. Chairman Eastman.

The Interstate Commerce Commission held in *Pennsylvania Paraffine Works* v. *P. R. R. Co.*, 34 I. C. C. 179, that it had the power under various sections of the act, includ-

ing Section 15 thereof, to require a carrier to furnish upon reasonable request and notice tank cars in sufficient number to move complainant's normal production of oil. The Commission in its report in that case made this statement respecting the argument of the defendant:

> "Defendant contends that the present case involves no rate, regulation, or practice, arguing that if it be a practice within the meaning of the Act for the carrier to furnish only 500 tank cars, it could be contended with equal reason that every detail of railroad operation is a practice within the meaning of the Act. Practice, it is contended, connotes a continued method of operation and not merely a single act."

We will first quote the provisions of Section 15 (paragraph 1) of the act:

> "That, whenever, after full hearing, upon a complaint made as provided in Section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, *or that any individual or joint classification, regulation, or practice* whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare or charge, or rates, fares, or charges, to be thereafter observed

in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), *and what individual or joint classification, regulation, or practice* is or will be just, fair, reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

This Court said, immediately following a reference to Section 15 of the Act (p. 229):

"Applying the section, it is contended that the neglect to provide or certainly the refusal to furnish tank cars is a 'practice' and became especially so by the reply made by the railroad to the request to furnish them.

Let us test the contention and see where it takes us. The request was for a special facility, a combination of package and car, and the question then is whether the neglect to provide it or to furnish it was a 'practice' within the meaning of Section 15. The far-reaching effect of an affirmative answer is instantly apparent, and there must be hesitation to declare it from the use of so inapt a word as 'practice.' Following a well known rule of construction, *we must rather suppose its association was intended to confine it to acts or conduct having the same purpose as its associates. And there were many such acts for which the word could provide—practices which confused the relation of shippers and carriers, burdened transportation favored the large shipper and oppressed the*

small one. These were illustrations in decisions of the Commission. And this was purpose enough, remedied all that was deemed evil in privately owned cars of any type. Beyond that it was not necessary to go; beyond that there were serious impediments to going. and we cannot but believe that if beyond that it was intended to go there would have been explicit declaration of the intent, with such provisions as to notice and time preparation as its consequences would demand—not ambushed in obscurity and suddenly disclosed by construction to turn accepted custom into delinquency, a construction that could be disputed and was disputed."

The language used by the Court in this case in construing the word "practice" as it appears in Section 15 of the Act is equally applicable to the present case. The real controversy as we have pointed out between these two sets of carriers is whether the cost of transferring through westbound freight from East St. Louis to St. Louis should be paid out of the rates and divisions of the East Side Lines or the West Side Lines. The order does not affect in the slightest the physical operation. The clear and intended effect of the order is to require the East Side Lines to reduce their revenues and to increase the revenues of the West Side Lines. It is as the Commission itself said, a question of the *apportionment between the East Side Lines and the West Side Lines of the revenue received for the transportation of through westbound freight from point of origin to point of destination.* There was no question before the Commission in this case of the reasonableness of an individual or joint classification, regulation or practice of a common carrier under such rate. As this Court said respecting the use of the word "practice" in this act:

"* * * We must rather suppose its association was intended to confine it to acts or conduct having the same purpose as its associates. * * *"

The Court then went on to say that there were many such acts for which the word could provide—practices which confused the relation of shippers and carriers, burdened transportation, favored the large shipper and oppressed the small one. These are all matters of course that involve essentially the relationship between carriers on the one hand and shippers and consignees on the other.

It is clear that the word "practice" as used in Section 15 must be construed in connection with the words which just precede it: "classification" and "regulation," and that the three deal with the services rendered by a carrier to a shipper or consignee under a rate and the regulations, classifications and practices which have been established by a carrier and which surround, affect or control the services which a carrier rendered under a given rate.

And the fact will not be overlooked that the Court said that these are matters that have illustration in the decisions of the Commission. A reference to a few of these decisions will show that this statement of the Court is correct and that the Commission itself has construed the word "practice" as we here contend it should be construed. For example, in one case a carrier's failure to perform the service of icing shipments of milk while exacting rates which included such service was held to be an "unreasonable and unlawful practice." (*Borden's Farm Products Co.* v. *N. Y. N. H. & H. R. R. Co. et al.*, 92 I. C. C. 270, 102 I. C. C. 497.) In another case the Commission held that it could lay hands upon the "issuance, form and substance" of bills of lading under its power to prescribe regulations and "practices," the bills of lading setting forth the conditions under which a carrier accepts and transports freight under a given rate. (*In the Matter of Bills of Lading*, 52 I. C. C. 671, 696.) In another case the Commission found that the failure and refusal of a carrier to establish concentration and warehousing arrangements on cotton under rates

which a carrier had published, constituted an unreasonable "practice" and subjected a shipper to unreasonable rates. (*Montgomery Cotton Exchange* v. *S. A. L. Ry. Co.*, 100 I. C. C. 579, 587.) In the recent decision of the Commission in *Manufacturers' Association of York* v. *Pennsylvania Railroad Co.*, 107 I. C. C. 219, the Commission held that the "practice" of two carriers of extending the use of their tracks to each other for the purpose of terminal receipt and delivery of freight at industries in York, Pennsylvania, within a certain zone, thus giving such industries the benefits and advantages in service, rates and routes of location upon both lines while contemporaneously refusing to accord to shippers or industries on their lines without the zone similar benefits and advantages, was unduly preferential of the industries within the zone. It was a question of service to one set of shippers under the rates charged such shippers as compared with the service rendered under the rates charged other shippers who the Commission found were similarly situated. In another case (*Postal Telegraph-Cable Co.* v. *Western Union Telegraph Co.*, 59 I. C. C. 512) the Commission found that the "practice" of a telegraph company in refusing to extend credit for tolls on messages tendered to it by one of its patrons, another telegraph company, while granting credit generally for tolls on messages tendered by the same senders and others, was unjust and unreasonable. It was a question of the rules and regulations that one telegraph company itself had established surrounding the sending and receipt of messages, the Commission holding that the Act was broad enough to cover any unreasonable "practice" of a common carrier to one shipper or patron or all.

But the Commission in the present case was not dealing with the relations between the East Side Lines and their shippers or their patrons. Its order has no effect on the charges paid by the shippers. It had before it the com-

plaint of carriers who have no relation to the East Side Lines as shippers, consignees, or patrons but whose sole and only interest is in the share of the revenue that they receive on through westbound traffic.

The cases just cited and the other cases cited by the West Side Lines in their brief before the Interstate Commerce Commission in support of their contention that rates and divisions could be changed in the guise of establishing a "practice" without giving any consideration to the measure of those rates and divisions and the comparative services performed thereunder, show that in such cases the Commission had before it matters dealing with the "practices" or rules or regulations of a carrier which in some way or other affected or determined the service which it rendered to shippers and consignees. The cases did not touch an issue respecting the apportionment of revenue between two contending sets of carriers.

The Interstate Commerce Commission itself in a very recent case construed the word "practice" as it is used in Section 15 of the Act exactly as the Supreme Court construed it in *United States* v. *Pennsylvania R. R. Co. supra.* In the *Los Angeles Passenger Terminal Cases,* 100 I. C. C. 421, the question before the Commission was whether the Commission had the power to require carriers to construct union passenger stations under such conditions as were presented in those cases. The Commission, after pointing out that if recourse be had to its power under Section 15 to determine what "practice" in lieu of that found in violation of the Act would thereafter be a just, fair and reasonable one, it was met by the decision in *United States* v. *Pennsylvania Railroad Co. supra,* said (p. 427):

> "The Court especially referred to the word 'practices' as used in Section 15 of the Act, and to the contention that the neglect to provide or the refusal

to furnish tank cars was an unlawful 'practice,' the discontinuance of which we could require. The Court concluded that the collocation of the term with 'classifications' and 'regulations' was intended to confine it to acts or conduct having the same purpose as its associates, and that it was not to be understood in the broad sense contended. The Court noted that a contrary conclusion would apparently give us power to order enlargement of terminal facilities, increase in the number of locomotives, and extension of tracks or branches. After stating that if Congress had intended such consequence 'it would not have left its intention to be evolved from obscure language but would have put it in explicit declaration and with notice and time for accommodation to it,' the Court said:

'It is difficult to particularize all that the ruling of the Commission implies of power. *What of omission or commission in the carrier's relation to the public may not be said to be a practice or practices in the broad sense* attempted to *be given to those words?* A railroad's powers are its duties, bearing, of course, obligations; and all of them by the asserted construction are swept under the jurisdiction of the Commission—so swept by a single word, not of itself apposite, and determined besides, by its associates, against the contention. This was apparent to the dissenting commissioners and repelled their concurrence. Well might they have recoiled from going to such extreme upon doubtful implication and have been impelled to declare as they did declare that if such power was given it logically and necessarily extended to every facility of transportation.' "

Paragraph 6 of Section 1 of the Act upon which the Commission also relies, reads as follows:

"It is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to

which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful."

Obviously this controversy has nothing to do with the establishment of just and reasonable classifications of property for transportation with reference to which rates, tariffs, regulations or practices may be prescribed. Nor has it anything to do with just and reasonable practices affecting classifications, rates or tariffs. There was no issue before the Commission in this case regarding the reasonableness of any rate or charge or the classification of property by a carrier for the purpose of rate making or the reasonableness of any regulation or practice affecting a classification, rate, or tariff. These are all matters that involve essentially the relation between a carrier on the one hand and the shipper or consignee on the other and they are inserted in the Act that not only may the rate itself be just and reasonable but that the rules, regulations and practices of the carrier under that rate, and which affect in some way or other the value of the service to a shipper or consignee that a carrier renders under such rates may also be just and reasonable.

Nor was there before the Commission in the present case any question respecting the regulations and practices affecting the facilities for transportation. There was no contention made that there was any shortage in such facilities or that the facilities were in any respect inadequate or insufficient. There was no contention made that these facilities should be changed in any way or that any other or different facilities should be provided.

Clearly this paragraph (par. 6 of Sec. 1) was written into the law to protect the shipper for it deals with matters that affect him alone. Its purpose was to insure that the shipper should not only have just and reasonable rates but that he should have just and reasonable regulations and practices surrounding the movement of his property which affect the value of the service received by him for which he pays a given rate. He is as much entitled to the one as to the other. This paragraph of the law deals solely with the relations between carriers on the one hand and shippers on the other. It can have no possible application to a case the essential controversy in which is, as the Commission itself found, one respecting the apportionment of revenue between carriers.

The Commission also relies upon paragraph 11 of Section 1 which paragraph must be read in connection with paragraph 10. We set forth below paragraph 10 and 11 of Section 1 of the Act:

> "The term 'car service' in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act.
>
> It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car

> service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

These sections have no application to the controversy between the East Side and the West Side Lines or to the issue which the West Side Lines sought to raise in this case and upon which the Commission acted. They have to do with operating matters only. The case has not a thing to do with the use, control, supply, movement, distribution, cost, interchange or the return of locomotives, cars, and other vehicles used in the transportation of property. The order of the Commission requires no change whatever in the present manner in which through westbound traffic is now handled through East St. Louis and St. Louis.

Paragraphs 10 and 11 of Section 1 of the Act were before the Supreme Court in *Peoria & Pekin Union Ry. Co.* v. *United States*, 263 U. S. 528. The Court there said (pp. 533-534):

> " * * * But 'car service' connotes the use to which vehicles of transportation are put; not the transportation service rendered by means of them. Cars and locomotives like tracks and terminals are the instrumentalities. To make these instrumentalities available in emergencies to a carrier other than the owner was the sole purpose of subparagraphs a, b, and c. It is to this end only, that provision is made by Paragraph 10 for the 'movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property.' This is substantially the same expression as was used in the Esch Car Service Act. * * *"

Appended to this decision of the Supreme Court is an extract from the report of the House Committee on Inter-

state and Foreign Commerce, setting forth the purpose of the amendment.

The dissent of Mr. Chairman Eastman on this point is most apposite:

> "I am not persuaded that the conditions of which complaint is made in this case constitute a 'practice' within the meaning of Paragraph (6) of Section 1 or Paragraph (1) of Section 15 of the Interstate Commerce Act. Such an interpretation seems to me to be precluded by *United States* v. *Pennsylvania Railroad Co.*, 242 U. S. 208, where it was held, in substance, that the word must be confined to matters which affect shippers as distinguished from matters which affect only carriers, that is, matters which confuse the relations between shippers and carriers or burden transportation, or favor a large shipper and oppress a small one." (Rec., p. 56.)

It may be helpful to consider the use of the word "practice" as it appears in other sections of the Act. Paragraphs 3 and 4 of Section 13 relate to rates, fares, charges, classifications, regulations or *practices* made or imposed by the authority of any state which cause any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other. The Commission under paragraph 4 is authorized to prescribe the rate or charge thereafter to be charged and the classification, regulation or *practice* thereafter to be observed in such manner as in its judgment will remove such advantage, preference, prejudice or discrimination. The word "practice" as used in these two sections cannot in view of the plain language of these sections, to say nothing of what the Supreme Court said in the *Pennsylvania Case, supra,* be construed in any other sense or way except in

connection with what precedes it. It relates to matters and things that are connected with rates that the shipper pays, it refers to and includes the regulations prescribed by a carrier which surround the transportation of property and which affect in some way or other the value of the service to a shipper that a carrier renders under such rates.

That this is so shown by Section 208 (a) of the Transportation Act, 1920, which provides that:

> "All rates, fares and charges and all classifications, regulations and *practices in anywise changing, affecting or determining any part or the aggregate of rates, fares and charges or the value of the services rendered,* which on February 29, 1920 are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by state or federal authority, respectively, or pursuant to authority of law. * * *"

Can there be any doubt that Congress intended that the word "practice" as it appears in other sections of the Act has any other or different meaning from the very clear meaning that Congress gave to it when it used the word in the section just quoted? It is obvious from this section that the word "practice" as used in these sections of the Act cannot possibly be construed to cover everything that a carrier does or may not do, but that it relates to matters between shippers and carriers which in some way or other change, affect or determine the measure or volume of the rate that is paid or some part thereof or the value of the service that is rendered thereunder. It has nothing to do with the apportionment of revenue as between the carriers themselves.

There is another recent decision of this which throws light upon the meaning of the word "practice" as used in the Act. In *Northern Pacific Ry. Co.* v. *Solum,* 247 U. S.

477, it appeared that the Northern Pacific had two routes between Duluth and other Minnesota points farther west, one intrastate with a heavy upgrade westward and the other interstate of lighter grades; that the Northern Pacific used in the absence of other shipping directions the former route for Minnesota traffic bound for Duluth and the latter for like traffic in the other direction. The charges under the interstate tariff were more than those allowed between the same points by the Minnesota law. This Court, in holding that the reasonableness of this "practice" of routing was an administrative question within the jurisdiction of the Interstate Commerce Commission, said (p. 483):

> "The Railway contends that, since the administrative question upon which its liability depends involves the reasonableness of a practice in interstate commerce and the traffic actually moved in interstate commerce, the Court had no jurisdiction to adjudicate the controversy until the administrative question had been determined by the Interstate Commerce Commission. The shipper, on the other hand, urges that the rule which requires such preliminary determination of administrative question by the Commission applies only to those cases where the question involved is whether a particular rate is unreasonable or whether a particular practice is discriminatory. But the rule is not so limited. It applies likewise, to any practice of the carrier which gives rise to the application of a rate. *Texas & Pacific Ry. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138, 147; *Pennsylvania Railroad Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 131; *Pennsylvania Railroad Co.* v. *Clark Brothers Coal Mining Co.*, 238 U. S. 456, 469. * * *"

Thus the Court again recognized that the word "practice" as it appears in these sections to which we have re-

ferred must be construed in connection with the words which precede it in these sections such as "classifications" and "regulations" and that all these are matters which relate to services that a carrier renders a shipper for a given rate and upon the measure, character or kind of which services the rate depends. They all relate to matters which involve the relationship between the carrier on the one hand and the shipper, who pays the established rate for such a service as is set forth in the published tariffs, on the other.

There was in this case no shipper complaining of either the rate paid or the measure or kind of services rendered under that rate or the classifications or the regulations or the practices that the carrier established and which affected determined or controlled the kind and character of the services that such carrier held itself out as rendering for that rate. The complaint was made by third parties who are neither shippers nor consignees, who neither pay nor bear any of the charges made by the East Side Lines for the services that the East Side Lines render under their rates. These West Side Lines who filed this complaint before the Commission are interested in the rates of the East Side Lines and the services that the East Side Lines hold themselves out as undertaking to perform under those rates only in so far as those rates affect the apportionment of the revenue on the through westbound traffic as between the East Side and the West Side Lines. And an issue respecting the apportionment of revenue as between two sets of carriers is not an issue respecting the measure or the reasonableness of the rates of one set of carriers alone or the reasonableness of the classifications, regulations and "practices" which affect or determine the services that the one set of carriers renders under those rates, but is an issue which involves the measure of the rate of one set of carriers as compared with the measure of the rate of the other set of carriers, consideration being given of course to the

services performed by the two sets of carries respectively under their rates, the transportation conditions surrounding the movement of traffic under the two sets of rates, and the other matters and things which the statute contemplates and requires shall be placed before the Commission in a case involving the apportionment of revenue between carriers.

The West Side Lines can have no possible complaint against the rates of the East Side Lines as such or the services that the East Side Lines render a shipper or consignee under such rates or the classifications, regulations and "practices" which the East Side Lines have established and which affect or determine the services that the East Side Lines hold themselves out as undertaking to perform under their rates. Any complaint that the West Side Lines have must be one which brings in issue the apportionment of the revenue on through westbound traffic as between the East and the West Side Lines. The Interstate Commerce Commission cannot possibly undertake to apportion revenue between the East and West Side Lines in the guise of fixing "practices" or anything else except in a case where an issue is specifically raised respecting the apportionment of revenue and upon a sufficient record.

We very respectfully submit that in the light of the language of these sections of the act upon which the Commission relies and the decision of the Supreme Court to which we have referred, the Interstate Commerce Commission has entirely misconceived and misconstrued the meaning of the word "practice" as it appears in the Act and that the order of the Commission predicated as it is upon such a construction of the word "practice" is based upon a mistake of the law and is beyond the power conferred upon the Commission by the Act.

8th. That which the Interstate Commerce Commission condemned as a "practice" was a "practice" for which the West Side Lines and not the East Side Lines were responsible.

We have shown that the fact that the West Side Lines have since 1877 voluntarily published and applied from and to East St. Louis the rates that they have published and applied from and to St. Louis and have undertaken since 1877 to provide and pay for such transportation services as might be required under the rates which they have voluntarily published and applied from East St. Louis on through westbound traffic, is not a "practice" within the meaning of that word as used in the Interstate Commerce Act. Our second point is that if these facts constitute a "practice" at all it would be a "practice" not of the East Side Lines but of the West Side Lines themselves and a "practice" voluntarily established and voluntarily maintained by the West Side Lines since 1877. The phrase "defendants' practices" appears in the Commission's report in several places and the finding is that the "practice" of the East Side Lines in requiring the West Side Lines to bear the charges of the transfer or Terminal companies for the transportation of through westbound traffic from East St. Louis to St. Louis will be unjust. The implication seems to be that the East Side Lines were responsible in some way or other for the publication by the West Side Lines of their St. Louis rates from East St. Louis. But the record and the Commission has found as we have pointed out that the publication by the West Side Lines in 1877 of their St. Louis rates from East St. Louis was wholly voluntary on their part, was made to meet the competition of the Chicago & Alton Railroad Company and that if the West Side Lines had not met this competition of the Chicago & Alton they would have been deprived of the tremendous volume of traffic which reached East St. Louis over the rails of the

East Side Lines. How can it be said under such circumstances that the voluntary publication by the West Side Lines of their St. Louis rates from East St. Louis, which of course carried with it the payment out of those rates of the charges of the transfer or terminal companies for the transportation of the traffic from East St. Louis to St. Louis, constituted a "practice" *of the East Side Lines?* The very statement of the question suggests the only answer that can be given and further indicates the plain error of law into which the Commission has fallen. The publication by the West Side Lines of their St. Louis rates from East St. Louis was a matter over which the East Side Lines had no voice, control, or direction; it was done voluntarily and this voluntary action on the part of the West Side Lines, which carried with it the payment out of their rates thus established the charges of the transfer or terminal companies, cannot possibly be changed into a "practice" of the East Side Lines.

We invite the court's attention to what Mr. Chairman Eastman said in his dissenting opinion on this point:

> "The report of the majority is based on the theory that the 'practice' attacked is a 'practice' of the East Side defendant lines alone. I can find no solid foundation for this theory. It is true that the tariffs of the East Side Lines contain a provision to the effect that where no joint rates are provided and the combinations are the same on St. Louis as on East St. Louis, through rates shall be made on the East St. Louis combination. But the West Side Lines had precisely as much right to publish a provision in their tariffs that in such cases the through rates should be made on the St. Louis combinations. They did not do so but allowed the tariffs of the East Side Lines to prevail on this point. Why? Apparently because they feared the competition of the Chicago & Alton, which receives traffic from the East Side Lines as a matter of necessity at East St. Louis.

It must be borne in mind that the West Side Lines originate more of the through traffic than do the East Side Lines. Potentially, from a traffic standpoint, they are more powerful factors in the situation than the East Side Lines and in a better position to impose their will. Why do they not do so, instead of turning to us for relief? Certainly not because of any inherent power which the eastern lines possess to dominate the situation by a 'practice.' The fair deduction is that the competition of the Chicago & Alton is the reason, and this deduction is supported by history. Through rates were made as they now are made, as I understand the record, beginning with the construction of the Chicago & Alton into East St. Louis in 1877, and long before the East Side Lines extended their local East St. Louis rates across the river to St. Louis.

If the West Side Lines are dissatisfied with existing conditions, let them withdraw from the 'practice' attacked, provide in their tariffs for the 'practice' which they desire, and refuse to absorb the charges of the Terminal Association on westbound traffic. There would then be an issue with which we probably should have to deal; but no such issue now exists and, as I see it, the 'practice' in question is as much a 'practice' of the West Side Lines as it is of the East Side Lines." (Rec., pp. 57 and 58.)

The East Side Lines stand in this controversy just exactly where they have always stood. Neither their rates nor divisions lawfully applicable to westbound through traffic have ever applied beyond East St. Louis. The rates and the divisions of the West Side Lines have on the contrary since 1877 uniformly applied from East St. Louis and have covered such transportation services as are necessary to move the traffic from East St. Louis.

The facts of record cannot possibly be turned into a "practice" of the East Side Lines. If there is any "practice" about them at all it is a "practice" of the West Side Lines.

The Commission says in its report:

> "The fact is that finding opportunity there, defendants (the East Side Lines) took advantage of it to require complainants to continue to pay the transfer charge not only on eastbound traffic but also on westbound traffic." (Rec., p. 25.)

And the order itself directs the East Side Lines to cease and desist from the practice of "requiring" the West Side Lines together with the Chicago, Burlington & Quincy Railroad Company or the Wabash Railway Company to bear the charges for the transfer service from East St. Louis to St. Louis on westbound through freight traffic passing through both points on combination rates which are the same on St. Louis as on East St. Louis.

But the East Side Lines never required the West Side Lines to establish their St. Louis rates from East St. Louis, the establishment of which rates carried along with it the payment by the West Side Lines of the transfer charge. This was a voluntary act on the part of the West Side Lines as we have shown and it is directly contrary to the evidence of record to find that there has been any "requiring" by the East Side Lines of what the West Side Lines have voluntarily done since 1877. The West Side Lines are the ones who through all these years have acknowledged that they were required to apply from St. Louis rates from East St. Louis in order to meet the competition of the Chicago & Aiton Railroad Company and of the other roads who have had their own rails to East St. Louis and are not required to handle traffic through St. Louis.

The record will simply not support any finding that the East Side Lines have "required" the West Side Lines to apply their St. Louis rates to and from East St. Louis.

5th. The Interstate Commerce Commission had no substantial evidence before it to support its order changing rates and divisions of through rates.

6th. Said Interstate Commerce Commission disregarded the various elements, which by the terms of the Interstate Commerce Act, said Commission is required to consider in a case which involves rates and divisions.

It was the plain and express purpose of the Commission in making the order it did to make an apportionment of the revenue on through westbound traffic as between the East and West Side Lines.

This it did by compelling the East Side Lines to pay out of revenues lawfully belonging to them under their tariffs for transportation to East St. Louis, the amount of the charges of the Terminal or other transfer companies for the transportation from East St. Louis to St. Louis, for which last transportation the West Side Lines are paid under their tariffs naming rates from East St. Louis to western destinations, and the charges for which they have heretofore borne in accordance with such tariffs.

This being so, what evidence would have been necessary in a case involving the apportionment of revenue between the two sets of carriers and in which case one set of carriers sought an increase in the revenues received by them from through traffic and reductions in the revenues received by another set of carriers on the same traffic? What is the kind and character of evidence that the Commission would have to have before it to support a finding that there was any injustice or inequality in the apportionment of revenue as between two sets of carriers?

It must be obvious that in the first place there would have to be a showing of the rates and divisions of the one set of carriers, the distances for which those rates and divisions apply and the services of transportation which

the one set of carriers undertakes to render under those rates and divisions as compared with the rates and divisions of the other set of carriers, the distances for which those rates and divisions apply and the transportation services which such set of carriers undertakes to render for such rates and divisions. That is to say, the record must contain a showing of such facts as will enable the Commission to consider the services performed by the one set of carriers as compared with those performed by the other set, in the light of the compensation received by the one set of carriers as compared with that received by the other set. The Commission would furthermore have to have before it rates and divisions in such number as would be typical of the situation. In *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, the Court, through Mr. Justice Brandeis, said (p. 291):

> "It cannot be inferred that every existing division of every joint rate is unjust as between particular carriers, because the aggregate result of the movement of the traffic on joint rates appears to be unjust. These aggregate results should properly be taken into consideration by the Commission; but it was not proper to accept them as a substitute for typical evidence as to the individual joint rates and divisions. In the *New England Division Case* (261 U. S. 184) tariffs and division sheets were introduced which, in the opinion of the Commisison were typical in character, and ample in quantity, to justify the findings made in respect to each division of each rate of every carrier. A like course should have been pursued in the proceeding under review."

Now the record in the present case may be searched in vain for any evidence touching the matters and things we have just referred to with respect to the rates of the East Side Lines up to East St. Louis applying on this through

westbound traffic or the rates of the westbound traffic applying beyond East St. Louis on that traffic. Evidence dealing with the circumstances and conditions surrounding the transportation of traffic by one set of carriers as compared with the circumstances and conditions surrounding the transportation of the traffic by the other set of carriers would include such statistics as the net ton miles, the freight ton miles, the freight locomotive miles, the freight car miles, the per cent of loaded to total car miles, the empty car miles, the freight cars per train, the tons per loaded car, the tons per car mile, the tons per train and other similar matters. The evidence before the Commission in this case does not touch upon any one of these matters.

The statute itself which deals with the apportionment of revenue between carriers sets forth some of the things to which the Commission is required to give due consideration. (Par. 6 of Sec. 15 of the Act.) It says:

> "* * * In so prescribing and determining the division of joint rates, fares and charges, *the Commission shall give due consideration, among other things,* to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

There is no evidence before the Commisison in this case dealing with the efficiency with which the East Side Lines

are operated as compared with the efficiency with which the West Side Lines are operated. There is no evidence dealing with the amount of revenue required by the East Side Lines to pay their operating expenses, taxes and a fair return on their railway property held for and used in the service of transportation as compared with the amount of revenue required by the West Side Lines for the same purpose? There is no evidence whatever dealing with the importance to the public of the transportation services of the East Side Lines as compared with the transportation services of the West Side Lines. There is no evidence of any fact or circumstances which would without regard to the mileage haul entitle the one set of carriers to a greater or less proportion than another set of carriers of the revenue received from the through westbound traffic.

The report of the Commissioner in the *Peoria & Pekin Union case*, 115 I. C. C. 469, will indicate the facts which the Commission should have before it in a case involving the apportionment of revenues between carriers and the facts to which the Commission gives consideration in passing upon such a question. Among the other facts which were offered in evidence in the Peoria & Pekin Union case and to which the Commission gave consideration were the following: The rate of return of the one set of carriers based upon their investment as shown by their books as compared with the rate of return of the other set of carriers; the financial condition on the whole of the one set of carriers as compared with the financial condition of the other set of carriers; the average railway operating revenue per mile of line of all the carriers in the one district as compared with all the carriers in the other district; the operating ratios of the two sets of carriers; the density of traffic of the two sets of carriers; the commodities which constitute the bulk of the traffic on one set of carriers as

compared with the commodities that constitute the traffic on the other set of carriers; the rate levels in the territory through which the one set of carriers operates as compared with the rate levels in the territory through which the other set of carriers operate; the length of the hauls under the rates and divisions of one set of carriers as compared with the length of the hauls under the rates and divisions of the other set of carriers and the ton-mile earnings under such rates. The Commission said in part in its report in that case (p. 506):

> "In order to be helpful, exhibits dealing with divisions like those covering rates should give either the distances over the direct routes or the average distances over all lines, or the average hauls of all actual shipments."

There was no evidence of the kind and character that the Commission had before it in the Peoria & Pekin Union case that was offered before the Commission in this case.

The reason why the West Side Lines offered no testimony of the kind and character that we have just referred to is not far to seek. The West Side Lines vigorously insisted throughout the hearing before the Commission that the case did not involve rates and divisions, but alleged unreasonable "practices." Indeed, one of their own witnesses (Mr. F. H. Leland) said (Rec., p. 340), that if he should testify in a case involving the divisions of rates between lines in the Central Freight Association territory and the Southwest he would have had a great deal to say about the volume of the divisions as compared with the volume of the rate; that he was not talking about that at all.

It may here be said that the West Side Lines on rebuttal introduced some exhibits purporting to deal with rates and divisions. For example, their Exhibit 72 is a historical statement of the class rates from a few eastern points to

St. Louis and East St. Louis. But no distances were shown and there was no exhibit offered in evidence comparing those rates and the services rendered under those rates with the rates, the distances, and the services rendered under the rates of the West Side Lines from East St. Louis to destinations west of St. Louis. Exhibit 73 is a statement of the through rates and the divisions thereof from various points east of the Mississippi River to destinations in Kansas on shipments moving in the year 1917. A case involving rates and divisions could not be tried out on the basis of the rates and divisions in effect nine years prior to the date of the hearing. No mileage is given of the hauls on either side of the river and the Exhibit is valueless as a comparison of the measure of rates and service.

Exhibit 74 is merely a statement showing the basis for the construction of rates from Central Freight Association territory to cities in the State of Iowa. No distances are shown and there is nothing whatever in this exhibit that throws any light upon the question whether the apportionment of the revenue as between the East and the West Side Lines on through westbound traffic in any respect unjust or unreasonable. Exhibit 75 is a statement of the rates from St. Louis to four points in southwestern Missouri with the rates to such points based on the Missouri state mileage scale. Exhibit 76 is a statement of the differentials over St. Louis in the rates to certain points in the Southwest, the local rates up to East St. Louis and St. Louis, and the arbitraries to East St. Louis. Only four groups of origin are shown, the destinations are for the most part grouped, and rates are shown on only five classes and six commodities. No distances are shown and it is wholly impossible from this exhibit to make any comparison of the services rendered by one set of carriers under the divisions they receive as compared with the

services by the other set of carriers under the divisions accruing to them. Furthermore, the exhibit deals only with traffic moving under joint through rates and this traffic is not covered by the order of the Commission in this case.

Exhibit 77 merely shows the railway operating revenues per mile of road, the net railway operating income per mile of road, the net ton miles per mile of road, and the miles of road operated of the East Side Lines and the West Side Lines. No evidence whatever was offered showing the investment in the properties of the East or West Side Lines, their present fair value, or the return which the carriers made under their operation for the year 1924 or 1925 on the value of their respective properties, and other similar matters which the statute contemplates and indeed requires the Commission shall have before it in a case involving the apportionment of revenue between carriers.

There was also testimony that because of the competition heretofore considered, or because of the orders of the State or Interstate Commissions, the West Side Lines could not raise their St. Louis rates to take care of bridge tolls to East St. Louis, and that the East Side Lines had slightly raised their rates to put St. Louis on a parity with East St. Louis, although not being enough to cover the bridge toll (Rec., pp. 324, 348-9, 354-360). The record, however, is wholly silent as to the comparative measure of rates on either side of the river considering service performed by each set of carriers, and the comparative needs of each to meet the burdens of operating costs and overhead. It does appear that the rates between St. Louis and the West and Southwest were sufficiently high to induce three carriers to go to the expense of crossing the Mississippi River twice to get the traffic offered, to-wit: the Alton, which to reach St. Louis crosses the Mississippi River at Louisiana

and East St. Louis, and the Cotton Belt and the East Side Line of the Missouri Pacific, each of which crosses at Thebes and East St. Louis.

Each of these three carriers accept and handle through business moving west on the basis of the East St. Louis combination, the same since the order of the Commission as before. The order of the Commission had no effect on the adjustment of through rates on a combination basis at East St. Louis between the East Side Lines and these three lines, who as the record shows, take and accept the business coming from the East Side Lines at East St. Louis without taking it across the river at East St. Louis. Nevertheless, out of their published rates from East St. Louis to western destinations, they must bear the expenses of transporting the freight across the river, whether they cross at Louisiana or Thebes. They do this in competition with the complainants before the Commission who do not have lines on the east bank of the river. Before the Commission's order all were on an equality; each bore the burden of transporting across the river. Since the order, the complaining West Side Lines have a distinct advantage in that they take the traffic involved, relieved of that expense. That expense is a considerable one. The Terminal's charge is 5 cents per hundred pounds on the first three classes; 3 1/10 cents on the fourth and fifth classes, and 2 7/10 cents on the sixth class. The Commission allowed at the southern crossing first an additional haul of twenty miles. Subsequently certain arbitraries beginning at 6½ cents for first class (Rec., pp. 359 and 389). In the light of these facts the testimony of Mr. Nash, a witness for the West Side Lines, found at page 360 of the record, is significant:

> "If the Commission should decide this complaint as complainants desire it to be decided, and such lines

> as the C. & A. should continue to accept business at East St. Louis and pay the bridge toll, the Frisco would take the business at St. Louis and let the East Side Lines pay the bridge toll, even if the C. & A. agreed to accept it at East St. Louis and pay the bridge toll. They would have to carry it across the river somewhere."

The complaining West Side Lines are trying to get an advantage without any cost to themselves, over both the East Side Lines and the defendant western lines, who are on the East Side. As was testified, "putting St. Louis on the map never cost the western roads one dollar" (Rec., p. 296). The putting of St. Louis on the map by the East Side Lines is the sole basis for this controversy. The West Side Lines are seeking an unearned increment. They have not shown, and apparently are unwilling to attempt to show, that they are entitled to it.

Now if the facts in this case constitute a "practice" within the meaning of that word as used in the act, certainly the Commission was in no position to determine whether that "practice" was unjust or unreasonable and whether as a result of a change in that "practice" the rates and divisions of the East Side Lines should be reduced by the amount of the transfer charges and the rates and divisions of the West Side Lines increased by a like amount unless the Commission had before it substantial evidence dealing with the rates and divisions of the two sets of carriers, the respective measure of those rates, and the comparative services performed thereunder, the distances, and other matters of a like character, including the matters and things which paragraph 6 of Section 15 of the act, dealing with the apportionment of revenue, requires the Commission to consider in a proceeding respecting the apportionment of revenue between carriers. It will be seen from what we have said and from the

exhibits which we have just described which the West Side Lines offered in evidence purporting to deal with rates and divisions, that there was no such evidence before the Commission in this case as would enable the Commission to pass upon the question involving the apportionment of revenue between carriers. The order of the Commission is without any evidence to support it.

To hold as does the Commission that the present "practice" of requiring the West Side Lines to bear the transfer charges on westbound freight traffic moving through East St. Louis to St. Louis on combination rates which are the same on St. Louis as on East St. Louis is unjust and unreasonable in that it is not disposed of on a reciprocal basis, is simply to state a conclusion based on one fact alone and that is the fact that the West Side Lines now bear such charges in both directions. The Commission in arriving at such a conclusion gave no consideration to the local circumstances and conditions at East St. Louis-St. Louis, the circumstances which prompted and indeed, according to the contentions of the West Side Lines, compelled them to apply their St. Louis rates from East St. Louis, the relative measure of the rates of the two sets of carriers, a comparison of the services performed thereunder, or similiar matters. The Commission's finding is essentially an arbitrary one.

If and when the West Side Lines follow the procedure provided for in the act for the determination of a controversy between two sets of carriers involving the apportionment between them of revenue on through traffic the East Side Lines will show that their present rates and divisions up to East St. Louis are wholly just and reasonable as compared with the rates and divisions of the West Side Lines beyond when consideration is given to the services rendered under those rates and divisions by the two

sets of carriers and the other matters and things that are pertinent and relevant and in fact required by the statute to be considered by the Commission in a case involving the apportionment of revenue between carriers.

We will show just as the carriers reaching Peoria, Illinois, from the West did in the *Peoria & Pekin Union Ry. Co. Case,* 115 I. C. C. 469, that under just and reasonable divisions the other set of carriers should bear the transfer charges in both directions. The fact will not be overlooked that in the *Peoria & Pekin Union Railway Company Case,* a case which involved the apportionment of revenue between two sets of carriers and in which there was a great mass of evidence dealing with the respective divisions of the two sets of carriers and the comparative services rendered by the two sets of carriers, the Commission found that the switching charges of the intermediate line *in both directions* should be borne by the lines reaching Peoria from the East who for many years had paid those charges.

We urge upon the court's attention the arbitrary character of the findings of the Commission as shown by the following: The Commission in the present case found that the usual "practice" among rail carriers is to divide the switching expense when the services of an intermediate carrier are utilized in affecting the interchange. It went on to say that this is the general "practice" of railroads throughout the country and that it believed it to be a just, fair and reasonable "practice" for general application. Yet it turned right around and in its decision in the *Peoria & Pekin Union Railway Company Case* found, after a consideration of the local conditions at Peoria and after giving weight to a comparison of the rates and divisions of the two sets of carriers and the services performed thereunder by such two sets of carriers and other

relevant and material matters, that at Peoria one set of carriers should bear the charges of the intermediate switching line *in both directions.*

7th. Even if that which was declared by the Interstate Commerce Commission in its report and order as constituting a "practice" was a "practice," the said Commission had no substantial evidence before it to support its finding that the "practice" was unjust and unreasonable.

Assuming only for the purposes of argument, that the facts complained of constituted a "practice" not involving rates and divisions, let us consider whether the testimony offered by the West Side Lines and considered by the Commission was sufficient to show that the alleged "practice" was unjust and unreasonable. This testimony consisted of statements, covering several hundred pages in the record, respecting investigations made by various witnesses of the West Side Lines of what was said to be the "practice" of the carriers in interchanging through freight at other points. (Witness B. H. Stanage, Rec., pp. 104, 182; witness C. C. P. Rausch, Rec., pp. 207, 211; witness James E. Hutchison, Rec., pp. 220, 223; witness H. R. Fertig, Rec., pp. 224, 234; witness R. C. Trovillion, Rec., pp. 238, 239.) The purpose of this testimony was to show which carrier, as between the carriers participating in the interchange of freight at a particular point, bears the cost of transporting through freight from one line to another in cases where two carriers connect direct and in cases where the service of an intermediate switching line is used to transfer traffic from one line to another in the same place or switching district.

As will be observed from a reference to this testimony, not one witness for the West Side Lines went beyond the bare statement that at a certain point one carrier deliver-

ing freight to another at that point assumes the cost of making the delivery. There was no effort whatever made by any of these witnesses for the West Side Lines to show that there was at any of these other points any such breaking of the rates as there is at East St. Louis; that the rates on through traffic of one set of carriers included the services only up to a certain point and that the rates of the other set of carriers had been established from that point and included whatever services were necessary to transport freight therefrom; that the agreed-upon divisions of the rates applying on through traffic moving through any one of these points had been fixed at such a point or station as to include the service rendered in moving freight from one carrier to another or that there was any such competitive situation at any one of these points as has existed at East St. Louis since 1877 and as exists at East St. Louis today and which brought about the establishment by the West Side Lines of their St. Louis rates from East St. Louis and the accompanying payment by them out of the rates of the transfer charges on through westbound traffic.

The West Side Lines in short did not undertake to show that the circumstances or conditions surrounding the interchange of freight at these other points or any of them were to any extent or in any respect comparable with those which gave rise to and which have since surrounded the interchange of through westbound freight traffic as between the East and West Side Lines. The West Side Lines developed no situation which was in any respect similar to that existing at East St. Louis-St. Louis.

It is significant that these witnesses said that they had not inquired into the rate situation at any of these points; that they confined their investigations to the *physical handling* of the shipment. (Witness, Stanage, Rec., pp.

198, 386; witness Fertig, Rec., p. 237.) We emphasize the point that the testimony of the witnesses for the West Side Lines respecting the alleged "practices" at other points merely described the physical interchange of shipments between carriers whose rails reach each one of these points. That is to say, their testimony related to the interchange of shipment between carriers whose rails meet or join in one switching district in one city or community. But this record shows that East St. Louis comprises one switching district and that St. Louis comprises another switching district; that the boundary lines of these two switching districts do not touch at any point; that the Mississippi River is between them. (Rec., pp. 260, 261.) East St. Louis and St. Louis are two separate and distinct industrial and governmental communities, separated by a great river. The issue which the West Side Lines sought to raise before the Commission was not one respecting the payment of charges for the interchange or the handling of traffic at East St. Louis between the East Side Lines and the West Side Lines that reach East St. Louis but one respecting the charges for the interchange or handling of traffic from the rails of the East Side Lines at East St. Louis which comprises one switching district and is a district governmental entity, across the Mississippi River to the rails of the West Side Lines at St. Louis, an entirely separate and distinct switching district and governmental entity. Obviously such a question must be entirely different from one respecting the payment of charges for the interchange of traffic between two sets of carriers in one city or in one switching district.

The Commission in its report made the following statement respecting this testimony of the West Side Lines:

> "In general support of their complaint the West Side Lines rely largely on the fact that it is the com-

> mon practice of carriers to reciprocally bear the burden of expense of transferring through traffic from one line to another. As a rule, the carrier which performs the inbound haul, the delivering carrier, switches or trucks the freight to its connection, or pays the expense of that service if performed by a third party. One of the few exceptions to this rule is found in other than trans-river traffic interchanged in the St. Louis-East St. Louis district where the receiving line bears the charge of an intermediate switching carrier. Among the few instances throughout the country in which reciprocity does not prevail is the situation here presented." (Rec., p. 20).

The Commission in announcing its conclusion said:

> "Defendants' practice is contrary to the generally accepted practice throughout the country. The usual practice among rail carriers is to divide the switching expenses when the services of an intermediate carrier are utilized in effecting interchange, the switching charge being absorbed by the carrier that delivers the traffic to its connection. There is a generally recognized obligation on the part of all carriers on through traffic to make delivery on the rails of their connections, either direct or by bearing the charges of the intermediate switching line, and this is the general practice of railroads throughout the country. We believe this to be a just, fair and reasonable practice for general application, and one which should be followed by the carriers serving the St. Louis-East St. Louis district. * * *" (Rec., p. 26.)

It will thus be seen that the Commission's findings are predicated upon a comparison of alleged "practices" at the East St. Louis-St. Louis gateway with alleged "practices" at other points in the face of the fact that there is no evidence of record which shows that the situation

at the other points, the alleged "practices" at which the commission uses as a standard, are in any respect comparable to the situation existing at East St. Louis-St. Louis. It is a well-established principle recognized by both the commission and the courts that comparisons are of no value unless accompanied by a showing that the circumstances and conditions are substantially the same (*Consolidated Lumber Co.* v. *Director General*, 101 I. C. C. 284; *Summerville Iron Works* v. *C. R. R.*, 101 I. C. C. 583; *Alton & Southern R. R. Co.* v. *Illinois Commerce Commission*, 316 Ill. 625, 147 N. E. 417; *Illinois Central R. R. Co.* v. *Railroad Commission of Kentucky*, 1 Fed. (2nd) 805.

The Commission, as we have just pointed out, found that the defendants' "practice" is contrary to the generally accepted "practice" throughout the country and that the usual "practice" among rail carriers is to divide the switching expense when the services of an intermediate carrier are utilized in effecting the interchange.

The fact of the matter is, however, that at the Ohio River crossing as the record shows (Rec., p. 314) there is such an overlapping in the rates but the southern roads pay the transfer charges across the Ohio River *in both directions*. It is important to observe that a witness for the West Side Lines (Mr. B. H. Stanage) described the physical handling of the shipments at the various Ohio River crossings as well as at crossings on the Mississippi River (Rec., pp. 383, 385), but made no reference to the manner in which the rates are made or the manner in which they break at those crossings and when he was asked on cross-examination a question respecting the rate situation at the Ohio River crossings, he said (Rec., p. 386):

> "I was dealing with the physical handling of the freight. * * *"

The Commission, furthermore, ignored the evidence showing that the same rate situation that was found at East St. Louis-St. Louis where the rates of the East Side Lines on through westbound traffic apply only to East St. Louis while the rates of the West Side Lines apply from East St. Louis is found at the crossings on the Mississippi River north of St. Louis. (Witness W. C. Maxwell, Rec., p. 287.)

If the Commission had measured or tested the reasonableness of the so-called "practice" at East St. Louis-St. Louis by the "practice" at other points where a comparable situation was found, it would have dismissed the complaint.

And the testimony of all the witnesses for the West Side Lines dealing with these alleged "practices" simmered down to the payment of transfer or switching charges. They all knew very well that what concerned them and the railroad companies for whom they work was the payment of the charges and the fact that their rates included the service of transporting freight from East St. Louis to St. Louis and that what they wanted was an increase in their rates by the amount of the transfer charges and to reduce the rates and the divisions of the East Side Lines by the amount of such charges. They were concerned about the payment of money out of their rates and divisions and not with any specious theories about "practices."

We respectfully submit that from whatever aspect the evidence offered by the West Side Lines be considered there was no evidence even if we assume that the facts referred to constitute a "practice" within the meaning of that word in the act, that such "practice" was in any respect unjust or unreasonable.

Mr. Chairman Eastman was exactly right in his dissenting opinion when he said:

> "But even if there were here a "practice" of the East Side Lines alone, what evidence is there that it is unreasonable? The mere fact that reciprocal deliveries are quite common throughout the country does not prove it to be unreasonable. Yet that is practically the only evidence presented." Rec., p. 58.

1st. Said order of the Interstate Commerce Commission was without any substantial evidence to support it and was arbitrary.

9th. The action of the Interstate Commerce Commission was based upon an erroneous construction of the Interstate Commerce Act, and deprives the plaintiffs herein of their property without due process of law, and is in contravention of the Constitution of the United States, and particularly the Fifth Amendment thereto.

If either of the contentions considered under the last two points be sound, it follows that the action of the Commission was without substantial evidence in support thereof, and its order was based on an erroneous construction of the Interstate Comerce Act, and unjustly deprives these plaintiffs of their property.

10th. Said District Court erred in failing to render a decree enjoining, setting aside, annulling and suspending the order of the Interstate Commerce Commission in the proceeding before it in its Docket No. 16697, bearing date July 12th, 1926, and permanently enjoining the enforcement of said order.

This point is a natural and inevitable consequence if we are right in any of the points for which we have hereinbefore contended.

We very respectfully submit, therefore, that the order of the Interstate Commerce Commission is invalid for the reasons above stated; that the District Court should have permanently enjoined the defendants and the intervenors from enforcing said order, and that the record being complete this Court should now order the District Court to enter such a permanent injunction.

Respectfully submitted,

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REPLY BRIEF

FILED
APR 6 1928
CHARLES ELMORE CRO
CL

In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 404

THE BALTIMORE & OHIO RAILROAD COMPANY; WILLIAM W. WHEELOCK and WILLIAM G. BIRD, Receivers of THE CHICAGO & ALTON RAILROAD COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; ILLINOIS TRACTION, INC.; ILLINOIS CENTRAL RAILROAD COMPANY; LITCHFIELD & MADISON RAILWAY COMPANY; LOUISVILLE & NASHVILLE RAILROAD COMPANY; MOBILE & OHIO RAILROAD COMPANY; THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; SOUTHERN RAILROAD COMPANY, and WABASH RAILWAY COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY; MISSOURI, KANSAS-TEXAS RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY, and ST. LOUIS-SAN FRANCISCO RAILROAD COMPANY,

Appellees.

REPLY BRIEF FOR APPELLANTS

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THE BALTIMORE & OHIO RAILROAD COMPANY; WILLIAM W. WHEELOCK and WILLIAM G. BIERD, Receivers of THE CHICAGO & ALTON RAILROAD COMPANY; CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; ILLINOIS TRACTION, INC.; ILLINOIS CENTRAL RAILROAD COMPANY; LITCHFIELD & MADISON RAILWAY COMPANY; LOUISVILLE & NASHVILLE RAILROAD COMPANY; MOBILE & OHIO RAILROAD COMPANY; THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; SOUTHERN RAILROAD COMPANY, and WABASH RAILWAY COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY; MISSOURI, KANSAS-TEXAS RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY, and ST. LOUIS-SAN FRANCISCO RAILROAD COMPANY,

Appellees.

REPLY BRIEF FOR APPELLANTS

In both the briefs of the Western Carriers and the Interstate Commerce Commission, unsuccessful attempts

were made to state the contentions of the Appellants. In neither brief is any attention paid to the main contention of the Appellants, that the rates of the East Side Lines applicable to the traffic extend only to, and are confined to, East St. Louis; and that the rates of the West Side Lines extend from East St. Louis; and that the East Side Lines can not be compelled to shrink their earnings on those rates by the payment of services performed west of East St. Louis, without an attack upon and finding of the unreasonableness or other unlawfulness of the East Side Lines' rates to East St. Louis applicable to the traffic; and furthermore, that if there be such an attack and finding a reduction made from the earnings of the East Side Lines can not be turned over to the West Side Lines without a comparison of the rates and services of both sets of carriers and other matters that are appropriate to a division case. That fundamental proposition in this case is presented in the brief of the Appellants, and the argument thereon it is submitted, is not met but avoided by both briefs for the Appellees.

No attack has been made on the reasonableness and lawfulness of the rates of the East Side Lines applicable to this traffic. No finding that they are unreasonable or otherwise unlawful has been made by the Commission. No scintilla of evidence has been pointed out, or can be, in the extensive record of this cause.

No decisions of the Commission or the courts have been cited in the brief for Appellees to extend the application of the word "practices" to controversies such as this between carriers which in no way affect the public, either in the matter or manner of service performed for the public or the compensation paid by it.

REPLY TO BRIEF OF WESTERN CARRIERS

I

Notwithstanding the head-note of Item I, page 1, of the brief for the Western Carriers, it is submitted that there are certain inaccuracies to which the court's attention in the interest of accuracy, should be called, even though the facts are remotely concerned with the real issue in this proceeding, because on those facts certain of their arguments depend.

While the Interstate Commerce Commission as stated on page 3 of the brief in *St. Louis Chamber of Commerce* v. *Director General*, 74 I. C. C. 308, 310, did say that the distance between St. Louis and East St. Louis is usually figured on a three-mile basis, it went on to say that the hauls of the Terminal on trans-river shipments probably average around ten miles. The commission has permitted compensation for the expense of crossing the Mississippi River by the addition of twenty miles to the actual distance, or in lieu thereof, has fixed arbitraries beginning at 6½ cents for first class. (R. 358, 359.) The value of the bridges greatly exceeds the average value of railroad mileage; *St. Louis Chamber of Commerce* v. *B. & O. R. R.*, 57 I. C. C. 639, 641, and transportation costs through congested terminals greatly exceed average costs of transportation.

While it is probably immaterial whether trans-river freight traffic involved is termed switching service or not, the applicability of the term depends entirely upon its definition. The lawful activities of the Terminal were not limited by the decree entered pursuant to the mandate of this court in *United States of America* v. *Terminal Railroad Association of St. Louis*, 224 U. S. 383; 236 U. S. 194, Exhibit 50, (R. 525), to switching, but to "the transaction of a terminal business such as supplying and oper-

ating facilities for the interchange of traffic between railroads, and to assist in the collecting and distributing of traffic for the carrier companies, switching, storing and the like." (R. 525 and 529.) There is no doubt that, in the performance of the services, it was within its powers as limited by the decree.

In connection with the figures at the top of page 4 of the brief pertaining to expenses of transfer, attention is called to the fact that the figures did not include coal, and coal of course, is westbound traffic. (R. 246, 248, 250.)

It is true that the eastern carriers have received increases, but the western lines have also received increases. The Commission has endeavored to give to each what was requisite to comply with Section 15 (a) of the Interstate Commerce Act. Exhibit 72, referred to in the brief, confined this showing of increases to those received by the eastern lines. Since the increases shown there have also been decreases, so the value of Exhibit 72, which is made Appendix A of the brief as bearing on this controversy is not apparent. Notwithstanding the increases to the eastern carriers they still are considered by the Commission as having a lower basis of rates than those in other sections of the country; *Wheeler Lumber Bridge & Supply Co.* v. *Director General,* 59 I. C. C. 6, 9; *Hirth-Krause Co.* v. *Director General,* 61 I. C. C. 350, 353.

On the other hand in a very recent decision of the Commission in which the Southwestern Lines undertook to get an increase in class rates prescribed by the Commission, the latter said:

> "While defendants' petitions appear to overstate the situation with respect to class rates, we are prepared to accept as correct their contentions that on the whole the class rates prescribed are somewhat lower than the present rates, but that this condemns the bases prescribed by us does not follow. *The*

class rates to, from, and between points in the Southwest have been among the highest in the country, transportation conditions considered." (Italics ours.)

Consolidated Southwestern Cases, 139 I. C. C. 535, 541, decided March 6, 1928.

The statement at page 13 with reference to the agreements between the Terminal Railroad Association and its proprietor companies is misleading. The provision relating to the rights granted being appurtenant to the railroad at pages 15 and 80 of Exhibit 51, was limited to proprietary companies. This provision as well as the provision for the interchange of passenger and freight business with each other; the provision for the distribution of operation and maintenance expenses as equitably as possible (page 19); the provision that each company shall receive equal and impartial privileges in the use of the Terminal (page 22); the provisions against discrimination in favor of any company in the use of the Terminal system, or any part thereof, or in respect to the transfer or handling of cars, and the provision that each company shall have equal facilities and accommodations with all other companies (page 24), are all part of the agreement of 1889, when, and for almost twenty years thereafter, the West Side Lines paid voluntarily and without objection, the transfer charge on through business in both directions, and could not have been made with any expectation of a change in that situation.

The amendments made 1914 (pages 139 and 140 of the Exhibit) were inserted for the benefit of and referred to: (1) any new company not named as a party to the agreement, who should thereafter desire to become a member of the Terminal, and who should receive equal rights upon just and reasonable terms to place it upon a plane of equality with the parties to the agreement, and (2nd) to

any other railroad company not electing to become a joint owner, whose enjoyment was insured upon just and reasonable terms and regulations to place it as near as possible on an equal plane with respect to expenses and charges, as that occupied by the proprietor companies. All the railroads, appellees, were parties to the agreement then made, and the amendments did not change in the least their relations to the Terminal with respect to equality of treatment and use. The Missouri Pacific was one of the original proprietors in 1889, Exhibit 51 (page 14). The Frisco became a proprietor June 9, 1902 (page 47). The Chicago, Rock Island & Pacific, December 16, 1902 (page 63), and the M. K. & T., December 16, 1902 (page 71). This date was long before any complaint or objection to the payment of transfer charges in both directions. In other words, such payment did not then offend any provision of the agreement, and the agreement not having been changed in any respect bearing upon such payment, its terms have no bearing on the present controversy.

The extract from Exhibit 59, page 16 of the Western Carriers' brief, is from a report to the legislature by the Municipal Bridge and Terminal Commissioners made May 24, 1907, before the rates to and from St. Louis and East St. Louis were put on a parity, which did not occur until January 1, 1908. (R. 551, 571.) Exhibit 59, in which this extract appears is the so-called Powell Committee Report, which committee was composed of three representatives of West Side Lines, and three of East Side Lines.

Under the adjustment contemplated in 1905 when the first effort was made to satisfy the St. Louis interests, St. Louis was given a differential over East St. Louis effective January 1, 1906, which differential was reduced June 15, 1906 (R. 549, 550, 574). St. Louis was not completely "put

on the map'' by being given a rate parity with East St. Louis for distances of over 100 miles until January 1, 1908.

The letter of Mr. George H. Ross, page 17 of the Western Carriers' brief, was the occasion of a meeting of the St. Louis carriers on January 17, 1906. The plan of Mr. Ross was objected to by Vice President Grammer of the Big Four. All western lines were represented at the meeting excepting the Missouri Pacific and the Cotton Belt, "and advised that they had made no request for the adjustment referred to by Mr. Ross, and stated that any grievance of the Western Lines would be taken up with the Eastern Lines.'' (R. 549, 550.) So long as St. Louis and East St. Louis were not on a parity, the lowest possible combination of rates was on East St. Louis, and the West Side Lines could not and did not make objection to paying transfer in both directions until the rate parity of 1908.

Reference is made at page 6 of the Western Carriers' brief to the supposed bearing on this controversy of the fact that there are 13 trunk lines on the east side and 4 trunk lines on the west side, with equal representation on the board of directors of the Terminal Railroad Association. The actions, however, that are referred to in the brief at pages 19 and 20, are actions not of the directors of the Terminal, but of the carriers. The carriers on the east side are in the majority, but of that majority on the east side, four if not five, are West Side Lines; the Alton, the Burlington, the Wabash, and the Cotton Belt. The Missouri Pacific has lines on both sides. The Western Carriers, appellees, who are now complaining, are only half of the western carriers interested. In the brief of the Commission the action on the controversy in 1914 by the board of directors of the Terminal is mentioned at page 15. The attitude of the board of directors of the

Terminal is best shown by the minutes of the meeting of September 14, 1914. (R. 430, 435.) The Terminal had no power to make the eastern lines accept the shipments it tendered to them. It did not refuse to handle shipments on which the charges were not guaranteed until it had made repeated efforts to deliver to the East Side Lines, and its rails and facilities were so clogged up that the action had to be taken of refusing shipments, unless charges were guaranteed. In doing so it appealed to the carriers concerned to settle their differences.

The Commission did say that by the readjustment of 1908, St. Louis and East St. Louis "were treated *as* one community," as quoted at the top of page 16 of Western Carriers' brief, but even if true that does not mean that they thereby were made one community. They are two very distinct communities—to a considerable extent rivals—as well as separate governmental and geographical entities, and they are not entitled to the same rates and same treatment in all respects; *St. Louis Chamber of Commerce* v. *B. & O. R. R. Co.*, 57 I. C. C. 639, 640. They are really two communities, which for the majority of rates are placed in the same rate group.

At page 23 of the Western Carriers' brief it is stated that the list of stations where there is reciprocal interchange includes all the Mississippi River crossings, but the testimony relates to reciprocity at the stations on either side of the river and not to reciprocity in service across the river, with the exception referred to at Natchez. The rates break on the east bank of the river, and the expense of the river transfer comes out of that portion of the rate applicable to the transportation west of the river. (R. 257, 259, 304-306, 317.) The testimony in relation to the incidence of the expense of interchange is limited to that within one city, place, or switching district, not to

that which is involved in this case; transfer between two different cities from one switching district to another—a movement of great expense across one of the world's greatest rivers—and from a point where the rate breaks to another point, which transfer is within the limits of territory covered by the rates applicable thereto of one set of carriers and outside of the territory covered by the applicable rates of the other set of carriers.

II

What has been said heretofore in reference to the contracts between the Terminal and its proprietors answers the contention II of the brief for the Western Carriers. It can not be contended that the expense of the Terminal should be equally divided, only in proportion to use. The question is for whose use is the westbound transfer made, and its answer is not found in the Terminal contracts.

III

The Western Carriers at page 30 of their brief refer to paragraphs of the Commerce Act on which they rely. Of these, paragraphs (3) and (4) of Section 1 of the act were not relied on by the Commission, and were not considered in the brief for Appellants. Paragraph (3) of Section 1 is the definition section and imposes no duties. Paragraph (4) makes it the duty of the carrier to provide transportation upon reasonable request, establish through routes and just and reasonable rates; provide rates applicable thereto; to provide reasonable facilities for operating through routes; to make reasonable rules and regulations with respect to the operation of through routes, and provide for reasonable compensation to those entitled thereto. With respect to joint rates carriers are required

to establish just, reasonable and equitable divisions thereof. The Appellants have established through routes for through traffic via East St. Louis; have by tariffs with respect to those through routes established reasonable rates. With respect to joint rates they have participated in the establishment of divisions which are reasonable and not attacked. With respect to others of the through routes when the traffic moves on combination rates, they have established reasonable rates "applicable thereto," and those rates have not been attacked. Those rates on westbound traffic which are in issue in this proceeding, extend from point of origin to a junction of the next succeeding carrier at East St. Louis. Whether the connecting carrier be considered the Terminal or the West Side Lines is immaterial. Prior to 1908, when the East Side Lines made their rates to St. Louis and East St. Louis the same, the lowest combination made on East St. Louis, and were so made because of the action of the West Side Lines in extending their rates to East St. Louis for the purpose of getting the business available there, for meeting the competition that is, of the western carriers who came into East St. Louis from the north and south, crossing the river at points above or below. After the change of local rates to St. Louis, East St. Louis continued to be the proper rate breaking point, because no change was made in the rates applicable to through transportation. The same rules and regulations with respect to the operation of through routes continued applicable and were just as reasonable before as after the rate change, as the rate change had no effect whatever on through routes and rates and affected not one whit the duties, expense, or remuneration of the West Side Lines. No case or proceeding is cited whereby a carrier under the guise of changing rules, regulations or practices has been required

to extend transportation under a rate or division applicable to one point to another point beyond. To extend a rate applicable to one point to another point beyond is manifestly not a matter of practice, rule or regulation, but a rate matter, and to that aspect in this case, no consideration has been given by the Commission, nor was the Commission asked to give it by the complainants in the proceeding before the Commission.

The other paragraphs of Section 1 relied upon, namely: Paragraphs (6), (10) and (11), were treated extensively in the brief for Appellants and that argument need not be repeated.

The Western Carriers also rely on paragraphs (1) and (3) of Section 3, which were not referred to by the Commission. Paragraph (1) of Section 3 is the paragraph, of course, forbidding undue or unreasonable preference or advantage, and paragraph (3) of Section 3 is the requirement against discrimination in rates, fares and charges between connecting lines, and against the undue prejudice of any connecting line in the distribution of traffic that is not specifically routed by the shipper, and contains an injunction on the carriers to afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and the receiving, forwarding and delivering of passengers or property to and from their several lines and those connected therewith. The Commission found against the complainants on their claim of unjust discrimination or prejudice (R. 22, folio 30). The complainants before the Commission have not complained of the Commission's order, and it is submitted therefore, that there is no question of discrimination or prejudice before this court. It may be pointed out, however, that the Commission's order does demand preferential treatment. Counting the Missouri Pacific as two lines,

since it has lines into St. Louis from the west and into East St. Louis from the south, there are nine western lines in competition for trans-Mississippi through business. Five of these, the Alton, the Burlington, the Wabash, the Cotton Belt, and the Missouri Pacific-East Line, take the business at East St. Louis and carry it across the Mississippi river at their own expense. The other four lines come into East St. Louis through the Terminal for the purpose of getting that business in competition with the five lines, but under the Commission's order the East Side Lines are compelled to discriminate in favor of these four against the five by paying for these four West Side Lines, the expense of getting the business across the river, which is not done for the five other lines. It is submitted that order of the Commission requires the East Side Lines to give a preference to the four, as against the five.

Finally by their brief the Western Carriers rely on paragraphs (1) and (3) of Section 15. Paragraph (1) of Section 15 was extensively treated in Appellants' brief. Paragraph (3) of Section 15 authorizes the Commission after full hearing to establish through routes and joint rates and the divisions thereof. It is the contention of the East Side Lines, that if a proper case had been made the Commission did have power under that section on proper evidence and findings, but the complainants before the Commission avoided appealing to the Commission and objected to any consideration of evidence under that section, and of course, can not now rely upon it as authorizing an order in an entirely different proceeding. Manifestly also paragraph (6) of Section 15 is a limitation on the power under said paragraph (3), and the western lines deny the applicability of paragraph (6).

The road haul transportation duties of a carrier do not include the performance of services not covered by the

rate. In the Los Angeles Switching Case, relied upon by the Western Carriers it was found by the Commission that the rate covered the service, that the switching involved "no greater expense than would team track delivery." *Los Angeles Switching Case,* 234 U. S. 294, 314. See also *St. Louis Chamber of Commerce* v. *B. & O. R. R.,* 57 I. C. C. 639, 650, 651. No one yet has discovered a decision that a rate to East St. Louis imposed the duty of performing service beyond East St. Louis. All that is required under the rate to East St. Louis was done by the Eastern Carriers in delivery to and on the rails of the next succeeding carrier. They do today in obedience to the order of the Commission, precisely the same as before in making that delivery. No change was made by the order in the handling of the traffic. The East Side Lines *perform* no more *service* now than then. For the same service they receive less money. Not their service but their rate has been changed.

The Commission has said that an increase in the switching charges of connecting lines, the respondents, which are absorbed by another line, "would result in the transfer of additional revenue from this carrier to the respondents, which is equivalent to a change in the present divisional arrangements." *Reciprocal Switching at Kansas City,* 68 I. C. C. 591, 596.

IV

There is no admission in the quoted arguments of the East Side Lines from their briefs filed in *Terminal Railroad Association of St. Louis* v. *U. S.,* 266 U. S. 17, that the Commission could change the point of interchange so as to put greater expense on one carrier and reduce the expense of the other carrier without a consideration of the rates and divisions of each. If counsel had extended

their quotation from the brief two sentences they would have included the following:

> "There are some features of this case that make it especially important for this court to determine the validity of the decree as affecting this point of interchange, and in that way as affecting the division of rates between the East Side Lines and the West Side Lines."

A reading of the briefs will disclose that the matter of rates and divisions was strongly insisted upon as controlling the controversy and this court in its opinion adopted the theory that the controversy involved rates and divisions.

From the concluding paragraphs of the brief for the East Side Lines (Appellants) we quote beginning at page 45:

> "In examining this record the court will find a rate situation which has existed for forty years, and which exists not only at the crossing between East St. Louis and St. Louis, but at every crossing of the Mississippi River between East St. Louis and East Dubuque. If, therefore, either rates or divisions of rates are to be corrected it surely must belong to the Interstate Commerce Commission to make this correction * * *. The transfer must be paid for by somebody, either the East Side Lines or the West Side Lines. Rates and divisions have been for forty years adjusted between the East Side Lines and the West Side Lines to take care of this expense, and to attempt to shift it from one set of carriers to another set of carriers without readjustment of the entire body of rates and divisions is to attempt an impossible task * * *. Certainly the Board of Directors of the Terminal Company has the right to determine what shall be paid to the Terminal Company for this service, but as to who shall pay for the service is a matter of division of through rates * * *."

In the brief for the Commission in the instant case at page 44, decisions of the Commission are cited where it has changed points of interchange; *Routing on Coal from Western Maryland Mines*, 66 I. C. C. 103; 74 I. C. C. 127. *Chicago, M. & St. P. Ry. Co.* v. *Union Pacific R. R. Co.*, 88 I. C. C. 312. In those proceedings the Commission established through routes via junctions desired by the complainants, which gave them longer hauls on tonnage which they originated so as to give them greater revenue.

V

The affirmative defense of the East Side Lines did not need to be proved, because the complainants made out no case requiring such a defense. It was a fair notice to the West Side Lines of what was really involved in the controversy, of which they refused to avail themselves. They insisted in excluding all reference to the reasonableness of rates and divisions, and the record is silent on that point. (R. 184-190, 198, 300.) The defense, however, was proved by showing that on traffic moving on joint through rates the divisions were made to and from East St. Louis, and on traffic moving on combination rates the rates to and from East St. Louis applied under the tariffs applicable thereto. That is, on westbound through traffic the East Side Lines published rates applicable to such traffic only to East St. Louis, unless the combination rates on St. Louis were lower, and the West Side Lines published rates from East St. Louis. Until attacked and found unlawful these published rates were and are the lawful rates; that is, they must be considered as just and reasonable rates until the Commission in a proper proceeding has found otherwise. The complainants did not choose to attack these rates and the Commission made no finding against them. In such attack the burden was on them.

Louisville & Nashville R. R. Co. v. *United States,* 238 U. S. 1, 11.

Neither did the complainants undertake to show that they were entitled to greater revenue on westbound through traffic than they had received out of rates applicable thereto since 1877. The Commission said in *Investigation and Suspension Docket No.* 2135, 91 I. C. C. 591, 595-596:

> "We have often recognized the principle that the long maintenance of rates such as are here involved is evidence that the same are reasonably high. In Freight Rates from Minnesota Points, 32 I. C. C. 361, we said:
>
> 'Undoubtedly the fact that a rate has been voluntarily maintained by a carrier for a period of years is evidence tending to show that it is reasonably remunerative, and when such a rate is sought to be increased the burden on the carrier would seem to require stronger proof of justification than in a case where the proposed increase relates to a rate that has been in effect but a short time.' "

In another case it said:

> "The continued maintenance of the commodity rate on butter justifies the conclusion that defendants regarded it as a compensatory rate."

Armour & Co. v. *Director General, as Agent, American Railway Express Co., et al,* 60 I. C. C. 663, 665.

> "For each rate, a carrier offers and obligates itself to perform a certain amount of service. If the service so offered and for a long time performed in consideration of that rate includes taking the property transported from a given point and delivering it at a given point, the delivery at that point is in no sense a 'free service.' The carrier may increase the

> rate or it may curtail the service performed for that rate, but if such action is challenged it must bear the burden of showing that the new rate or service is reasonable and free from unjust discrimination."

Rates in Chicago Switching District, 34 I. C. C. 234, 242.

VI

Under this item the brief for the Western Carriers discusses the decision of this court in *Terminal Railroad Association* v. *United States,* 266 U. S. 17. The views of the Eastern Carriers were fully presented on this point in their original brief. (pages 40-43.)

VII

In this section of the brief the Western Carriers again rely upon the same sections of the act as under their Section III, page 30, in answer to which we endeavored to point out that the sections enumerated do not support the Commission's order.

The language of paragraph (3) (of Section 3) "afford all reasonable, proper, and equal facilities for interchange," is stressed and the contention made that the East Side Lines did not furnish equal facilities, because the West Side Lines were compelled to furnish all the facilities of interchange. It is submitted that there are two misconceptions here. First: this is in the section relating to preferences and the word "equal" must be construed in connection with the subject matter and its associates which clearly refer to all connecting lines who must be served without preference or discrimination as held in *Pennsylvania R. R. Co.* v. *United States,* 236 U. S. 351. Again, it overlooks the obligation under the rates of the West Side Lines to transport through traffic to East St.

Louis from the West and from East St. Louis to the West, and that at East St. Louis the East Side Lines before the order, treated all connections alike and did all that was required of them in the interchange of freight. The cases cited from the Supreme Court; *Myrick* v. *Michigan C. R. Co.*, 107 U. S. 102, and *Texas & Pacific Ry. Co.* v. *Reiss*, 183 U. S. 621, were correct in referring to the terminus of the originating carriers in those particular cases, but clearly points of interchange are not exclusively at the termini of carriers. Junction points for interchange of freight occur all along the line of every carrier in this country. The junction point to and from which rates are made, or via which through rates and divisions apply are necessarily the points at which the duty of delivery to a connection applies.

REPLY TO BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

Counsel for the Commission have fallen into some of the errors of counsel for the Western Carriers with respect to the evidence, and what has been said in answer to Section I of the Western Carriers' brief is to some extent applicable to the comments in the Commission's brief on the same matter. At page 22, the case of the Cincinnati, Ohio-Covington, Kentucky gateway is attempted to be differentiated from that at the St. Louis-East St. Louis gateway, in that the lines of northern carriers do not extend to the south bank of the river. But their rates do. For traffic local to Covington the northern carriers pay the southern carriers for the transfer across the river, but on shipments for points beyond, the southern lines bear the whole expense. The situation is just the same as at St. Louis, in that the carriers on one side of the river

pay for more service on shipments local to points on the south bank of the river than they do on shipments for points beyond passing through these points on the south bank of the river. At the Louisville gateway the northern lines do extend to the south bank of the river, and the northern lines actually take the freight there and yet the southern lines pay the bridge arbitrary. (R. 314.)

At page 28 it is said that the East Side Lines added three miles to the actual East St. Louis mileage in computing their St. Louis rates, "this, of course, for the purpose of covering the expense of the river transfer." The three miles, of course, did not cover any considerable portion of that expense. The Commission's allowance for the Mississippi River arbitrary was twenty miles. (R. 358, folio 474.) The Terminal's charges were 7.4 per cent. of the Eastern Carriers' local rates on shipments listed in Exhibit 73. (R. 346.)

Reference is made to the increases obtained by the Eastern Lines but is silent as to the increases made to the Western Lines. The last general increases were made by the Commission in *Ex Parte* 74, *Increased Rates,* 1920, 58 I. C. C. 220, and the increases were made to put all carriers in the different rate groups on the same basis, and those increases were made having in mind the payment of the bridge toll in both directions by the Western Lines and not by the Eastern Lines. (R. 287 to 289.)

The argument of the Commission is that this court held in *Terminal Railroad Association* v. *U. S.,* 266 U. S. 17, that the order is within the power of the Commission. This court held that the Commission had jurisdiction under its power over rates and divisions; it did not hold that the Commission had jurisdiction under its power over rules, regulations and practices without consideration of rates and divisions.

With respect to practices the Commission's brief at page 39 sets out the essentials of paragraph (6), Section 1, from which it clearly appears that the practices, rules and regulations are limited to those "which may be necessary or proper to secure the safe and prompt receipt, handling, transportation and delivery of property subject to this act, upon just and reasonable terms." As we have heretofore stated the order of the Commission does not at all affect either the safe and prompt receipt, or the handling, or the transportation, or the delivery of property. All those things are done just the same under the order as before, and no claim was made, evidence introduced, or finding made with respect thereto. The language of this section is demonstrative of its purpose to benefit the shippers and consignees, and not to affect the division of compensation between connecting carriers, which is all that the order of the Commission accomplished. Paragraph (1) of Section 15 also quoted at page 40 of the brief adds nothing further to the definition of practices.

At page 43 of the brief for the Commission cases from this court are cited to the point that under Section 13 (1) the West Side Lines had a right to complain of any other common carrier of anything done or omitted to be done by the latter in contravention of the provisions of the act, but the cases do not hold that the requirements of the act with respect to "practices" relate to the relations of carriers *inter sese*. The cases cited, *Pennsylvania Co.* v. *U.S.*,236 U. S. 351; *Chicago, Indianapolis & Louisville Ry. Co.* v. *U. S.*, 270 U. S. 287, relate to discriminations between carriers, equality of treatment being expressly enjoined under Section 3 (3). *United States* v. *New York Central R. R.*, 272 U. S. 457, 462, relates to additional jurisdiction given to the Commission over rail and water

lines, and especially the jurisdiction of determining and prescribing the terms and conditions upon which connecting tracks between the rail and water lines shall be operated, and compensation therefor, including the establishment of through routes and joint rates, and also the terms and conditions under which they shall be operated. It is submitted that none of these cases tend to enlarge the definition of "practices" so as to include the present controversy.

The brief for the Commission recognizes very clearly that the controversy is one concerning rates and divisions. At pages 42 and 43 it is stated that:

> "the practice is one directly concerned with the application of rates. The Commission's order regulates the application of the existing rates; its effect is to require the application of the St. Louis combination on westbound through traffic, instead of the East St. Louis combination, to the end that the transfer charge will have to be paid by the East Side Lines out of their rate factor to St. Louis. Its further effect is to require the cancellation of the above-mentioned tariff provision of the East Side Lines."

This tariff provision is that by which pursuant to Paragraph (4) of Section 1, and Paragraph (1) of Section 6, the Eastern Carriers have established and published the East St. Louis rates as applicable to the through transportation. The word "practice" in a very broad sense covers everything which the carriers customarily do, including the making and publishing of rates, but the word is manifestly not used in any such sense in the act. The subject of rates and tariffs was fully covered prior to the inclusion of the word "practices" in the act. Therefore, it can not properly be used as a guise under which the rates may be changed without examination into

the reasonableness or lawfulness of the published rates, or to change the divisions of through rates, even if not joint through rates, without examination of the reasonableness and adequacy of the separate factors therein, and the respective abilities and necessities of the participating carriers. What the east side carriers object to is that the Commission has, as now admitted in its brief, changed these rates and divisions, while claiming only to affect a practice, without an attack, finding or evidence with respect to the rates or divisions which it has changed. No one disputes that the Commission has power to change rates and divisions when its jurisdiction is lawfully invoked for that purpose and proper evidence is submitted to it. The denial of power in the Commission in this proceeding to do what it has done, is made because its jurisdiction to do what it has done was not invoked, and no proper evidence submitted to it sustaining its order.

Again, at pages 48 and 49 the brief recognizes that the controversy is one regarding rates and divisions. With respect to joint through rates it is said the Commission could *upon proper evidence* (italics are ours) have fixed liability for the transfer charges by adjusting divisions, and therefore it would not be a reasonable or logical construction of the act that the Commission should have that power in instances where the traffic moves on joint through rates and should lack it in instances where the traffic moves on combination rates. Manifestly, for the exercise of the power in respect to joint through rates, the Commission would need evidence made necessary by Congress under Section 15 (6). *Brimstone R. R. & C. Co.* v. *United States*, — U. S. —, decided February 20, 1928. Is it a logical or reasonable construction of the act that while such evidence is requisite in the case of joint through rates, no evidence of the reason-

ableness of either rate in the combination or of what was relatively just compensation for the East Side Lines and what for the West Side Lines, is necessary when the Commission changes the divisions of through rates which are not joint rates? The Commission undertook to divide the total compensation between the East Side and West Side Lines without having before it such facts as would enable it to reach a conclusion as to what would be relatively just compensation. It is contended for the Commission at page 49, that the Commission had authority to do this under Paragraphs (1) and (3) of Section 15. These sections have primarily to do with the establishing of rates, and to establish rates the Commission must have evidence pertinent to the reasonableness of the rates determined upon and ordered to be published. It is true that the word "practices" is used in Paragraph (1), but it is not to be supposed that it was there used with a different meaning than as defined in Section 1 (6), or that by using the word "practices" Congress authorized the establishment of rates, or changing of rates, without evidence in regard to the rate involved. *Florida East Coast Line* v. *United States*, 234 U. S. 167, 185.

> "Where an existing freight rate is attacked, the burden is on the complainant to establish that it is unreasonable in fact. This is especially so where, as here, the rate has been in force for a long period during which time the traffic greatly increased in volume." *Louisville & Nashville R. R. Co.* v. *United States*, 238 U. S. 1, 11.

This Court said in *Central Railroad of New Jersey* v. *U. S.*, 257 U. S. 247, 258:

> "Congress could not have intended that under such circumstances relief should be afforded under Section 3 when a direct remedy is available under Section 1."

Similarly it must be apparent that Congress could not have intended to afford the same relief by the inclusion of the word "practices" as that which is directly available under the provisions of the law applicable to the reasonableness and lawfulness of rates and the divisions thereof.

The reduction of the revenue of the Eastern Lines under the tariff changes ordered by the Commission, is a very material one. From such various points of origin in C. F. A. territory and East thereof on the shipments shown in Exhibit 73, the loss was 7.4 per cent of the Eastern carriers' revenue as pointed out in the brief of the Commission at page 26. (R. 345-347.) This exhibit was based on rates prior to the 15 per cent advance allowed in 1917. Since then the rates both of the Terminal and the carriers have been increased, but probably the percentage of reduction will not differ very materially from the above.

The history of this rate situation is a demonstration of the necessity of considering the reasonableness of the rates and what is relatively just compensation between the East and West Side Lines before the Commission could lawfully order the change in tariffs which it has ordered, effecting as its order does, such a substantial reduction in the revenue of the Eastern carriers.

Prior to 1908 the rates of the East Side Lines were higher to St. Louis than to East St. Louis, and the rates of the West Side Lines the same from East St. Louis as from St. Louis. The combination on East St. Louis was the lower, which had the effect of making the rates break there. By the tariffs then in effect the Eastern Lines' transportation or road haul duties ended at East St. Louis, and the Western Lines' duties began there. The Western Lines could not and did not contend that

there was any injustice in their paying the transfer charge in both directions. The joint ownership of the Terminal existed then as now. The agreements governing the relations of the proprietary companies thereto were the same then as now. The practice of interchange at other points was presumably the same then as now. For two years prior to 1908 the East Side Lines made rates to St. Louis, and it was then as much a terminus of their lines as now. Nevertheless, it must be conceded that the Commission had then no power under the guise of establishing a practice to order the East Side Lines to pay the Terminal charges on westbound through traffic. The "practice" of the West Side Lines in paying the Terminal charge in both directions was a necessity under the West Side Lines' own tariffs in establishing rates to and from East St. Louis the same as to and from St. Louis. They did not want the four other carriers who were in East St. Louis to get all the business to be interchanged with the strictly Eastern Carriers, which other four did pay the expense of the Mississippi river transfer out of their East St. Louis rates. What these four Western Lines who were on the east side could afford to do, the four direct East Side Lines, appellees here, were willing and able to do to meet that competition. It was the rates and nothing but the rates that made that situation such as it was, and the rates were the voluntary rates of the West Side Lines. They willingly paid the price to do the business. There was no inequity or unreasonableness in it.

Did anything happen in 1908 that made it inequitable?

It must be remembered that at this time the C. F. A. rates, of common knowledge, were abnormally low and entirely inadequate. *The Five Per Cent Case,* 31 I. C. C. 351, 399-403.

This well-known fact explains why these C. F. A. lines were compelled to insist on their locals as their divisions of through rates, and the Western Lines were willing to bear the whole shrink in making joint through rates less than the sum of the locals. (R. 330-333.) It explains also why the Commission in attacks upon through rates found the proportion of the rate applicable west of the river to be too high and reduced it without reducing the proportion east of the river. (R. 278.)

Notwithstanding this low basis of rates St. Louis insisted on being put on a rate parity with East St. Louis. This the East Side Lines could not do without some return for the 7.4 per cent reduction that would be made in their revenues on St. Louis local business. Some of this was secured by increasing the East St. Louis rates from 116 per cent to 117 per cent of the New York-Chicago rate resulting in increases of one cent per hundred pounds on first class, one-half cent on second, third and fourth classes, and nothing on the fifth and sixth classes, which are the classes on whose rates moves the heavy tonnage carload freight. (R. 266.) These increases were much less than the bridge tolls. This, of course, had the effect of increasing those through rates which were made up of combinations of locals, so that for that through business the Eastern Lines got something to reimburse them in part for the loss sustained on the local St. Louis business, so long as the St. Louis local rates were not used as combinations of through rates to any great extent. But the whole was only partial reimbursement. As said by the witness for the Western Lines:

> "In order, therefore, to offset *to some extent* the reductions which they had given the St. Louis business interests, they added to the proportions which they demanded on traffic from the East to points in

Western Trunk Line territory, to which through rates were made on combination basis * * *." (R. 342, 343.)

"So again I say that the rates established by the East Side Lines to and from St. Louis have been made with *some consideration* of the added expense of getting across the river, and if they were not so made the opportunity has been before the East Side Lines to take care of this situation in 1907, and as to C. F. A. territory in 1917, and if they have not done so it is their own fault." (R. 348.)

It is thus admitted that there was some loss of revenue to the East Side Lines in putting St. Louis on the map, even when limiting the St. Louis rate to local business and continuing to apply the East St. Louis rate to through business. Consequently the East Side Lines did not publish their St. Louis rates as applicable to through business, except only in so far as it was necessary to do so to prevent Fourth Section violations. On through business the East St. Louis rates are published as the factor applicable to the transportation where the combination on St. Louis is not lower by the tariff note drawn by the Chief of the Bureau of Tariffs of the Interstate Commerce Commission. (R. 261-262.) The West Side Lines publish their rates to and from East St. Louis without any limitation. It is therefore the publication of rates in this manner by both the East Side Lines and the West Side Lines which fixes the incidence of transportation duties east and west of East St. Louis on through rates made on combinations, just the same now as prior to 1908. That incidence cannot properly be changed without a consideration of the propriety of these combination rates east and west of East St. Louis. These tariff provisions make East St. Louis the point where the rates break and the transportation duties begin and

end, as certainly as do divisions of joint through rates and combination rates made on proportionals applicable only to East St. Louis, as to both of which the Commission has not by its order undertaken to make any change under the guise of changing practice.

What justifies the West Side Lines in seeking an extension of the St. Louis rates to through business? Their service, expense or remuneration has not been changed by the step taken by the East Side Lines. The suggestion in the last quotation of the witness is that the East Side Lines could have obtained enough out of the public to enable them to pay the interchange on through business without loss, by increasing the local rates to St. Louis and East St. Louis sufficiently. But why should either the public or the East Side Lines pay the West Side Lines to keep up their competition with the Alton, the Cotton Belt and other western carriers on the east side? The Commission recently authorized the West Side Lines to make their East St. Louis rate by adding the usual bridge arbitraries to the St. Louis rate, but they will not avail themselves of the authority because they want the East St. Louis traffic, and to get it they must apply the St. Louis rate to East St. Louis. (R. 359, 360.) They want to eat their cake and have it too. They want the East Side Lines to pay them for meeting the rates of their competitors, which gives them an advantage over those competitors as heretofore pointed out. The only justification that there could be for the order of the Commission is that the rates of the East Side Lines are relatively higher compared with the West Side Lines, all factors being considered that are relevant to such an inquiry. The East Side Lines think that such an inquiry would demonstrate that they are not, and probably the West Side Lines take the same view for they avoid such

an inquiry, which is the only way the controversy can be justly settled.

It is said that the East Side Lines can afford to pay because they have had their rates raised (Western Carriers' brief, page 6), and because they are in a better financial condition than the Western Lines. (Commission's brief, page 53.) As to the first reason the relations of the rates of the two sets of carriers have not been inquired into. It has not been shown to what extent the Western Carriers have had their rates increased. It has not been shown in what relations the rates stood prior to the advances, nor has any showing been made on the question as to what are the comparative needs of each set of carriers, for which needs adequate rates must be provided. The record does show that in Ex Parte 74 the Western Carriers in 1920 had their rates advanced 35 per cent, while the Eastern rate group was given an advance of 40 per cent, and these were the advances which the Commission thought adequate to the needs of each to put them on the same earning basis under the Transportation Act, and it was based on the evidence of the Western Carriers as to their needs wherein they treated the payment of the transfer charge in both directions as one of their expenses. (R. 287-289.) As to the second reason there is no evidence in the record showing that the Eastern Carriers are in a better financial condition than the Western Carriers. Exhibit No. 77 which is the only evidence relied on in this connection, is wholly inadequate for that purpose. (Appellants' brief, page 74.) There is no evidence whatever as to the influence of the St. Louis rates on the financial condition of either set of carriers, whatever it may be.

It is respectfully submitted that the Appellees' briefs do not justify the order of the Commission.

Respectfully submitted,

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